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SHAREHOLDER PROPOSALS AND THE LIMITS OF ENCRYPTED INTERPRETATIONS

J. ROBERT BROWN, JR.*

I. INTRODUCTION

SHAREHOLDERS have the right under Rule 14a-8¹ to include proposals in a company's proxy statement.² Almost always precatory,³ proposals advise rather than command.⁴ The provision provides a mechanism for obtaining the collective views of shareholders.⁵ Typically opposed by management, proposals generally engender discussions on matters that companies would prefer to avoid.⁶ Moreover, although advisory, proposals can impose meaningful constraints on managerial discretion.

* Board Member, Public Company Accounting Oversight Board. The views expressed in this Article are those of the author and do not necessarily reflect the views of the PCAOB, the other members of the Board, or the Board's staff. The PCAOB makes no representation as to the accuracy or completeness of this information. The Article was written and accepted for publication prior to the author joining the PCAOB. At that time, the author was the Lawrence W. Treece Professor of Corporate Governance and the Director, Corporate & Commercial Law Program, University of Denver Sturm College of Law. Thanks to Bernard Sharfman for reading a draft and providing comments. The views and errors, however, belong exclusively to the author.

1. 17 C.F.R. § 240.14a-8 (2017).

2. The right is limited to companies subject to the proxy rules. The proxy rules apply to issuers that have registered a class of shares with the Securities and Exchange Commission under section 12(g) of the Securities Exchange Act of 1934. See 15 U.S.C. § 78l(g) (2012).

3. See Catherine G. Dearlove & A. Jacob Werrett, *Proxy Access by Private Ordering: A Review of the 2012 and 2013 Proxy Seasons*, 69 BUS. L. 155, 165 (2013) ("Most of the [shareholder access] proposals submitted in 2012 were precatory, including the two proposals that were ultimately successful.").

4. See Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 273 (2016) ("Importantly, most shareholder proposals—and virtually all social and environmental proposals—are precatory, which means that they are recommendations and are not binding on management.").

5. The costs are largely born by the issuer. See Stephen M. Bainbridge, *Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal*, 85 FORDHAM L. REV. 705, 708–09 (2016) ("Absent Rule 14a-8, there would be no vehicle for shareholders to put proposals on the issuer's proxy statement From the proponent's perspective, the chief advantage of the Shareholder Proposal Rule is that it is inexpensive.").

6. Management can include a statement of opposition. See 17 C.F.R. § 240.14a-8(m). For a discussion of this requirement, see generally Alex Hinz, *Issuer Opposition and Shareholder Disagreement: Rule 14a-8(m)*, 93 DENV. L. REV. ONLINE 223 (2016). In a few instances, management has supported a proposal. A proposal at Layne Christensen received over 90% where the board recommended adoption. See, e.g., Layne Christensen Co., Current Report (Form 8-K) 3 (June 9, 2011), <https://www.sec.gov/Archives/edgar/data/888504/000115752311003631/a6758154.htm> [<https://perma.cc/UK26-EY2R>] ("Stockholder proposal regarding the

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An often contentious provision,⁷ the rule has over time been subject to significant modification.⁸ What started as a lithe provision of 215 words eventually morphed into a behemoth ten times as long, with much of the additional verbiage consisting of procedural hurdles and substantive exclusions.⁹ Not all of the limitations, however, were included in the text. The Securities and Exchange Commission (SEC or Commission) added an interpretive gloss to the rule. In some cases, the guidance defined terms or provided insight on existing elements. In other instances, the interpretations substantively altered the meaning of the rule.

The administrative positions were often encrypted. Encryption entailed the use of interpretations known within the agency but not otherwise disclosed publicly. The positions instead became apparent through application.

Informal advice with respect to Rule 14a-8 appeared in “no-action” letters.¹⁰ The missives, at least since the 1990s, generally contained no meaningful analysis but merely agreed or disagreed with a company’s position. Only with repeated application to a variety of fact patterns did interpretive positions become known. Even then, the boundaries often

preparation of a sustainability report”; received “For: 14,873,784”; “Against: 1,147,321”; “Abstains: 1,611,235”). Management recommended approval of the proposal. *See* Layne Christensen Co., Proxy Statement (Form DEF 14A) 33 (May 10, 2011), <https://www.sec.gov/Archives/edgar/data/888504/000115752311002976/a6710913.htm> [<https://perma.cc/QUW7-2PTD>].

7. *See* U.S. SEC. & EXCH. COMM’N, REPORT OF THE TASK FORCE ON DISCLOSURE SIMPLIFICATION 80 (1996), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1990/1996_0305_TF_DiscSimpl.pdf [<https://perma.cc/99CU-V6C5>] (“Few areas of the federal securities laws have been as contentious as shareholder proposals under Exchange Act Rule 14a-8.”).

8. Calls continue to arise for restrictions on the use of the rule, particularly through a dramatic increase in the eligibility thresholds. *See* Letter from Mark J. Costa, Chairman and Chief Exec. Officer, Eastman Chem. Co., Smart Regulation Comm. Bus. Roundtable, to Gary D. Cohn, Dir., Nat’l Econ. Council 3 (Feb. 22, 2017), <https://businessroundtable.org/sites/default/files/Regulations%20of%20Concern%20Letter%20and%20List%20170222.pdf> [<https://perma.cc/PF63-FNMC>] (“In too many cases, activist investors with insignificant stakes in public companies make shareholder proposals that pursue social or political agendas unrelated to the interests of the shareholders as a whole. BRT released specific recommendations on ways to reform the shareholder proposal process to tighten eligibility and enable more exclusions of proposals and repeat submissions. BRT can accomplish most of its goals through SEC rulemaking, interpretation and guidance but pressure from Congress, including potential legislative action would encourage the SEC to move forward.”).

9. *See generally* J. Robert Brown, Jr., *The Evolving Role of Rule 14a-8 in the Corporate Governance Process*, 93 DENV. L. REV. ONLINE 151 (2016) [hereinafter Brown, *Evolving Role*].

10. For a discussion of the no-action letter process, see Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 936–43 (1998); *see also* Thomas P. Lemke, *The SEC No-Action Letter Process*, 42 BUS. L. 1019, 1028 (1987).

remained unclear and were subject to abrupt shifts in scope and meaning.¹¹

The reliance on, and consequences of, encrypted interpretations can be seen in connection with the use of subsection (i)(3) of Rule 14a-8.¹² Added in 1976,¹³ the provision allowed companies to eliminate proposals and supporting statements deemed false and misleading. Taking on a much broader purpose than contemplated by the rule, the provision was quickly deployed as an editing tool.

The exclusion targeted submissions that were poorly written or contentious.¹⁴ Statements did not have to be false but could be excluded to the extent deemed confusing, irrelevant, or vague. The Commission balanced the broad interpretation with a liberal right to cure. Shareholders often received the ability to revise language identified as problematic.¹⁵

Neither the editing function nor the right to cure appeared in the rule. Instead, they became apparent only through application. Moreover, with the boundaries unclear, interpretations shifted over time. The uncertainty meant that issuers could challenge almost any proposal as misleading. As a result, by the new millennium, the exclusion became the most widely used basis for seeking the omission of a proposal.¹⁶

The tax on administrative resources resulting from the approach ultimately induced a shift in interpretation.¹⁷ To reduce the number of contested proposals, the scope of the exclusion was narrowed.¹⁸ In particular,

11. For a further discussion of these abrupt shifts, see *infra* note 197.

12. 17 C.F.R. § 240.14a-8(i)(3) (2017).

13. Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, 1976 WL 160347, at *18 (Nov. 22, 1976).

14. For a further discussion of the exclusion's effect, see *infra* Section II.

15. The right did not apply to proposals requiring "detailed and extensive editing." See Div. of Corp. Fin., Shareholder Proposals, SEC Staff Legal Bulletin No. 14, 20 (July 13, 2001), <https://www.sec.gov/interps/legal/cfs1b14.htm> [<https://perma.cc/8GKV-2AYP>] ("[W]hen a proposal and supporting statement will require detailed and extensive editing in order to bring them into compliance with the proxy rules, we may find it appropriate for companies to exclude the entire proposal, supporting statement, or both, as materially false or misleading.").

16. See app. A.

17. See Div. of Corp. Fin., Shareholder Proposals, SEC Staff Legal Bulletin No. 14B (Sept. 15, 2004), <https://www.sec.gov/interps/legal/cfs1b14b.htm> [<https://perma.cc/UKX5-NL6V>] (essentially reversing longstanding interpretive positions under subsection (i)(3) of Rule 14a-8).

18. The bulletin acknowledged that the prior interpretation had not been an "appropriate" extension of the exclusion. See *id.* ("We believe that the staff's process of becoming involved in evaluating wording changes to proposals and/or supporting statements has evolved well beyond its original intent and resulted in an inappropriate extension of rule 14a-8(i)(3)."). The reference to "staff" throughout the Article generally means the staff of the Division of Corporation-Finance, the Division within the Commission responsible for administering and interpreting Rule 14a-8. See Div. of Corp. Fin., Informal Procedures Regarding Shareholder Proposals (Nov. 2, 2011), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8-informal-procedures.htm> [<https://perma.cc/7W4W-PFES>].

issuers seeking exclusion as false and misleading had to present objective evidence of falsity.¹⁹

The shift in interpretation was not encrypted but publicly announced in a SEC staff legal bulletin.²⁰ By making the change known immediately, participants could quickly modify their behavior. The number of no-action letters addressing the exclusion dropped significantly.²¹

The bulletin, however, only conveyed part of the administrative shift. The bulletin did not reveal that, simultaneously with the narrowing of the exclusion, proponents lost the right to cure. Proposals with language deemed false, or vague, or irrelevant, would, for the most part, be excluded, with no ability to revise.

Awareness of the shift in this “long-standing” doctrine only became clear over time through application. In 2004 alone, over eighty no action letters gave proponents the right to cure. During the next thirteen years, the number fell to less than ten over the entire period.²² Moreover, in some cases, the revisions reflected administrative policy rather than editing concerns.²³

The use of encryption matters. The approach involves administrative positions typically developed in a non-transparent fashion. The use of encryption adds uncertainty and cost to the shareholder proposal process. The approach avoids direct involvement by the Commission and reduces accountability.

This Article will examine the use of encrypted interpretations under Rule 14a-8, focusing on the exclusion for false and misleading statements in subsection (i) (3). In particular, the piece will chronicle the transformation of the exclusion into an editing tool, something that included a robust right to cure. Eventually, the interpretation of the exclusion changed, with the Commission essentially conceding that the interpretation had strayed from the language of the rule. The final sections will assess the implication of this approach, including the costs associated with encryption, and discuss the need for increased transparency and accountability with respect to informal interpretations of the rule.

19. *See infra* notes 107–09.

20. Staff legal bulletins represent a summary of staff views. *See generally* *Staff Legal Bulletins*, SEC. & EXCH. COMM’N, <https://www.sec.gov/interp/legal.shtml> [<https://perma.cc/GW6D-GAJG>] (last visited Dec. 29, 2017). Staff legal bulletins in the shareholder proposal space have become common.

21. *See* app. A (listing sharp drop after 2004 regarding usage of editing function and right to cure proposals after issuance of publically-announced bulletin).

22. *See id.* (listing only eight instances of editing and allowing right to cure between 2005 and 2017).

23. Thus, in one case, issuers were instructed to delete a statement suggesting Commission agreement with the proposal. *See infra* note 115 and accompanying text.

II. RULE 14a-8 AND THE EXCLUSION FOR FALSE AND MISLEADING DISCLOSURE

A. *The Evolution of Rule 14a-8*

Rule 14a-8 originally embodied a remarkably straightforward and uncomplicated approach to shareholder proposals.²⁴ The right extended to owners, without consideration of the number of shares held or any particular holding period.²⁵ Applicable issuers had to include all proposals, excluding only those deemed improper subjects for shareholders, a standard dependent not on the vagaries of administrative interpretation but on the requirements of state law.²⁶

The elegant simplicity, however, did not last. Pressure to restrict shareholder use of the rule quickly emerged and became a routine fixture in the evolution of Rule 14a-8.²⁷ Issuers pressured the Commission to add additional grounds for exclusion and to implement procedural barriers that would restrict access to the rule. The changes were sometimes justified as necessary to deny use of the provision by “special interests”²⁸ or to

24. Adopted in 1942, the Rule was originally numbered X-14a-7, renumbered X-14a-8 in 1948, and finally Rule 14a-8 in the 1950s. See Securities and Exchange Commission Release Notice, Exchange Act Release No. 5,436, 1957 WL 7638, at *1 (Jan. 7, 1957) (noting the “new system of numbering” rules and regulations under the securities laws).

25. See Securities and Exchange Commission Release Notice, Exchange Act Release No. 3,347, 1942 WL 34864 (Dec. 18, 1942). When circulated for comment, the provision originally sought to permit the inclusion of shareholder nominees. The concept was, however, not adopted following objections from issuers. See J. Robert Brown, Jr., *The SEC, Corporate Governance and Shareholder Access to the Board Room*, 2008 UTAH L. REV. 1339, 1358–60 (2008).

26. Comments on the proposed rule came mostly from issuers. See generally *Bills to Suspend the Authority of the Securities and Exchange Commission Under Section 14 (A) and Section 14 (B) of the Securities Exchange Act to Issue Rules Relating to the Solicitation of Proxies, Consents, and Authorization During the Period of War Emergency: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the Comm. on Interstate and Foreign Commerce*, 78th Cong. 18 (1943) (statement of Ganson Purcell, SEC Comm’r) (noting that for rules adopted in 1942, “We received written comments from in excess of 500 person or corporations, of course mostly the companies to be affected”).

27. Early use of the rule was modest but nonetheless troubling to some issuers. See Brown, *Evolving Role*, *supra* note 9, at 153–54.

28. See Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 39093, 1997 WL 578696, at *2 (Sept. 18, 1997) (noting one purpose of the rule is to streamline administration “whereby companies are permitted to exclude proposals furthering . . . special interests”).

prevent shareholder harassment²⁹ and abuse³⁰ of management. At the same time, however, calls for additional restrictions often aligned with “spikes” in the number of proposals,³¹ suggesting concern with “active use”³² rather than actual abuse.³³

29. See Proposed Amendments to Rule 14a-8 Under the Securities and Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 19135, 1982 WL 600869, at *14 (Oct. 14, 1982) (“There has been an increase in the number of proposals used to harass issuers into giving the proponent some particular benefit or to accomplish objectives particular to the proponent.”); see also Robert K. McConnaughey, Comm’r, U.S. Sec. & Exch. Comm’n, Address at the American Society of Corporate Secretaries at the Harvard Club of New York City (Nov. 10, 1948), <https://www.sec.gov/news/speech/1948/111048mcconnaughey.pdf> [<https://perma.cc/YQ3U-V7YJ>] (“You are also aware, of course, that in a few cases managements have been badgered by proposals which apparently were not submitted in good faith, or were submitted for the purpose of achieving some ulterior personal objective unrelated to the interests of the corporation.”).

30. Instances of abuse were rarely discussed at length in the relevant releases. Moreover, in at least some instances, the alleged abuse was not systematic but the result of a single or small number of investors. Thus, for example, concern arose over the “abuse” of multiple submissions by shareholders to a single company. See Shareholder Proposals, Exchange Act Release No. 9432, 1971 WL 126135, at *1 (Dec. 22, 1971) (“The Commission has also noted that security holders have submitted a large number of identical proposals to a number of companies. . . . Where a security holder submits proposals and then does not appear at the meetings of the companies involved, all security holders have been put to considerable expense to no purpose. The Commission regards this practice as an abuse of the rule and intends to monitor the practice in the future.”). The “abuse” was, apparently, the result of a single shareholders. See *Rand Ingersoll Co.*, SEC No-Action Letter, 1978 WL 13152, at *8 (Feb. 22, 1978) (“In 1971, Mr. Shields submitted shareholder proposals to more than thirty companies. Although Mr. Shields had stated his intention to present these proposals at the various annual meetings, he failed to do so. Early in 1972, several companies stated to the Commission staff that they believed Mr. Shields’ new proposals should be excludable on the grounds of his prior ‘bad faith’ conduct. The staff agreed”); see also William J. Casey, Chairman, U.S. Sec. & Exch. Comm’n, Remarks on New Proxy Rules, Address at the Corporate Law Conference, Washington, D.C. (Sept. 21, 1972), <https://www.sec.gov/news/speech/1972/092172casey.pdf> [<https://perma.cc/W7N8-E537>] (“During the 1972 proxy season, the staff issued no-action letters with respect to proposals submitted by persons having a record of buying a share of stock in several companies, submitting multiple proposals to those companies, and not following through with a serious effort to have the proposals considered and debated. Thus by taking this administrative action, the Commission conserved its own resources and made it easier for companies to protect themselves from unnecessary cost and trouble.”).

31. See Brown, *Evolving Role*, *supra* note 9, at 152.

32. See Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Related to Proposals by Security Holders, Exchange Act Release No. 20091, 1983 WL 33272, at *13 (Aug. 16, 1983) (Comm’r Longstreth, dissenting) (“I do not believe the active use of the proxy machinery by shareholders is, of itself, an abuse; therefore, I do not favor changes the effect of which will be to reduce that usage by responsible shareholders.”).

33. Thus, for example, commentators viewed as an abuse the ability of shareholders who resubmitted proposals after making “subtle” changes, although the practice was permitted by administrative interpretation. See Memorandum from Linda Quinn, Bill Morley & John Gorman, to Lee Spencer & John Huber, at 26

The Commission amended the rule to add significant restrictions in 1948,³⁴ 1954,³⁵ and 1983.³⁶ Notice and comment generally preceded these changes,³⁷ facilitating participation by interested parties.³⁸ Moreover, the Administrative Procedure Act required a mandatory delay in the effective date of any change,³⁹ giving shareholders time to develop work-arounds and practices designed to address the impact of the revisions.⁴⁰

(June 7, 1983), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1983_0607_Revision14a8.pdf [<https://perma.cc/335G-T8QA>] (“The majority of the commentators did support the change suggesting that it was an appropriate response to counter the abuse of the process by certain proponents that make subtle changes in proposals each year which permit them to keep raising the same issue despite the fact that shareholders have indicated by their votes that they are not interested in that issue.”).

34. *See generally* Adoption of Amendments to Proxy Rules, Exchange Act Release No. 4185, 1948 WL 28695 (Nov. 5, 1948).

35. *See generally* Adoption of Amendments to Proxy Rules, Exchange Act Release No. 4979, 1954 WL 5772 (Jan. 6, 1954). For a further discussion of the 1954 amendments’ effect on proposals, *see generally* David C. Bayne et al., *Proxy Regulation and the Rule-Making Process: The 1954 Amendments*, 40 VA. L. REV. 387 (1954).

36. *See generally* Amendments to Rule 14a-8 Under the Securities and Exchange Act Relating to Proposals by Security Holders, Exchange Act Release No. 20091, 1983 WL 33272; Leila N. Sadat-Keeling, Comment, *The 1983 Amendments to Shareholder Proposal Rule 14a-8: A Retreat from Corporate Democracy?*, 59 TUL. L. REV. 161, 196 (1984) (“[T]he amendments represent a serious restriction on shareholder participation in corporate governance and a retreat from the goal of management accountability.”).

37. *See generally* 5 U.S.C. § 553(b) (2012). In rare cases, changes were not part of the proposed amendments but were only added at the time of adoption. In at least one case, shareholders successfully challenged the amendment for failing to provide an opportunity for the requisite notice and comment. *See* United Church Bd. for World Ministries v. SEC, 617 F. Supp. 837, 841 (D.D.C. 1985) (finding SEC’s inadequate and ambiguous notices of rule changes denied plaintiff minority shareholders administrative due process).

38. *See generally* Exchange Act Release No. 20091 (discussing comments received on proposed amendments).

39. *See* 5 U.S.C. § 553(d).

40. The history of the rule is filled with examples of work arounds that were labeled abuses. For example, the rule originally imposed a word limit that applied only to the statement of support for the proposal. Predictably, shareholders shifted some of the explanation to the proposal itself. *See, e.g.*, Shareholder Proposals, Exchange Act Release No. 9432, 1971 WL 126135, at *1 (Dec. 22, 1971) (“Sometimes a security holder in submitting a proposal to the management of the issuer will include a preamble or series of ‘whereases’ which are in effect arguments in support of the proposal. These arguments are in addition to the permitted 100-word statement and appear to be an attempt to circumvent the 100-word limit.”). The Commission determined that “any statements in the text of a proposed resolution which are in effect arguments in support of the proposal are to be considered a part of the supporting statement and subject to the 200-word limitation.” *Id.* Ultimately, the Commission amended the Rule to apply the word limit to both the proposal and the supporting statement. *See* Exchange Act Release No. 20091, at *11 (“A proposal and its supporting statement in the aggregate shall not exceed 500 words.”).

In at least some instances, the comment process resulted in changes to the proposed amendments.⁴¹

B. *The Exclusion for False and Misleading Statements*

1. *Adoption*

Codifying existing administrative interpretation,⁴² the exclusion for false and misleading disclosure⁴³ only became an explicit part of the rule in 1976.⁴⁴ Proposals or supporting statements could be omitted to the extent “contrary to any of the Commission’s proxy rules” something that expressly included violations of “Rule 14a-9 which prohibits materially false or misleading statements in proxy soliciting materials.”⁴⁵

The language clarified that the exclusion applied not merely to inaccurate statements but to those that also violated Rule 14a-9.⁴⁶ The antifraud provision encompassed “materially” false and misleading

41. See Brown, *Evolving Role*, *supra* note 9, at 156 n.40 (noting corporate spokesmen’s feelings of “victory” after passage of 1954 amendments led to decreased number of proposals).

42. See Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 9343, 1976 WL 160410, at *6 (July 7, 1976) (noting exclusion “would simply formalize a ground for omission that the Commission believes is inherent in the existing rule”); see also Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12999, 1976 WL 160347, at *9 (Nov. 22, 1976) (“This provision simply formalizes a ground for omission that the Commission believes has been inherent in the proxy rules.”). The exclusion of proposals deemed violations of Rule 14a-9 had been a longstanding practice. See, e.g., Div. of Corp. Fin., Summary of Interpretations, Commission Minute re: Union Electric Company, at 205–06 (Feb. 24, 1961), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1960/1960_1964_Interprt_Corp_Finance.pdf [<https://perma.cc/Y8U9-9PWF>] (approving exclusion of proposals seeking to “censure of certain officers for ‘profiteering’” under Rule 14a-8 and Rule 14a-9).

43. The Commission also added an exclusion for proposals that violated the law, something that presumably encompassed those considered fraudulent or in conflict with the proxy rules. See Exchange Act Release No. 12999, at *8. Proposals violating Rule 14a-9 were already subject to exclusion from the proxy card. See J. Robert Brown, Jr., *The Proxy Rules and Restrictions on Shareholder Voting Rights*, 47 SETON HALL L. REV. 45, 62 n.84 (2016).

44. See Exchange Act Release No. 12999, at *17–18. Although added to the rule in 1976, the approach mostly codified existing administrative interpretations. See *supra* note 42.

45. See 17 C.F.R. § 240.14a-8(i)(3) (2017).

46. See Exchange Act Release No. 12999, at *8 (“The Commission is aware that on many occasions in the past proponents have submitted proposals and or supporting statements that contravene one or more of its proxy rules and regulations. Most often, this situation has occurred when proponents have submitted items that contain false or misleading statements. Statements of that nature are prohibited from inclusion in proxy soliciting materials by Rule 14a-9 of the proxy rules.”).

statements⁴⁷ made with the requisite state of mind.⁴⁸ Rule 14a-9 addressed a number of explicit prohibitions, including statements that “impugn[ed] character” or charged “illegal or immoral conduct . . . without factual foundation.”⁴⁹

Once added, the language of the exclusion underwent no significant change.⁵⁰ In 1982, the Commission concluded that “the staff’s practice [with respect to the exclusion] has worked well.”⁵¹ The rewriting of the exclusion into plain English in 1998 resulted in a renumbering of the provision but did not give rise to any substantive changes.⁵²

2. *Editing Tool*

Although narrowly written, the exclusion quickly took on a much broader scope. Issuers confronted proposals that, while not false, included factual errors and irrelevant references. Supporting statements sometimes resorted to pejorative statements,⁵³ negative characteriza-

47. *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (describing materiality standard).

48. *See generally* J. ROBERT BROWN, JR., *THE REGULATION OF CORPORATE DISCLOSURE* (4th ed. 2017).

49. *See* 17 C.F.R. § 240.14a-9 n.b. The language was added in 1956. *See* Adoption of Amendments to Proxy Rules, Exchange Act Release No. 5276, 1956 WL 7757, at *4 (Jan. 17, 1956).

50. The Commission did, however, acknowledge and approve administrative interpretations not otherwise appearing in the rule. *See* Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 20091, 1983 WL 33272, at *6 (Aug. 16, 1983) (“The Commission indicated that it believed it appropriate for the staff to give proponents the opportunity to amend portions of proposals or supporting statements which might be violative of Rule 14a-9 at the time they were submitted, since issuers are accorded the same opportunities with respect to their soliciting materials. While some commentators were critical of the latitude given to proponents to make such modifications, the Commission has determined not to change its administration of paragraph (c)(3).”).

51. *See* Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 19135, 1982 WL 600869, at *13 (Oct. 14, 1982).

52. *See* Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 23200, 1998 WL 254809, at *2 (May 21, 1998) (“We are adopting minor plain-English revisions to paragraphs (2), (3), and (4) under Question 9, former rules 14a-8(c)(2), (c)(3), and (c)(4).” (footnotes omitted)). The amendments did specify that the misstatement had to be material. *See* 17 CFR § 240.14a-8(i)(3) (prohibiting “materially false or misleading statements in proxy soliciting materials”). The release, however, provided no insight into the amendment, suggesting that the change codified existing interpretation.

53. *See, e.g.*, USX Corp., SEC No-Action Letter, 1990 WL 285933, at *1 (Feb. 1, 1990) (finding that the term “nincompoops” could be deleted as a violation of Rule 14a-9).

tions,⁵⁴ and unsupported assertions.⁵⁵ The exclusion for false and misleading statements became the tool for editing out problematic language that did not necessarily constitute false and misleading disclosure⁵⁶ required by Rule 14a-8.⁵⁷

As a result of encryption, the broad approach became apparent only through application. The exclusion extended to statements characterized

54. References to compensation as “lavish” or payments described as “over-reaching” were viewed as possibly “false.” Am. Elec. Power Co., SEC No-Action Letter, 1977 WL 15064, at *10 (Feb. 28, 1977). The terms “windfall” and “bonanza” were viewed as possibly “misleading.” See Occidental Petroleum Corp., SEC No-Action Letter, 1985 WL 54158, at *1 (Apr. 5, 1985) (“[T]he proponent has indicated in his letter dated February 14, 1985, his willingness to substitute the word ‘gain’ for the word ‘windfall,’ and to substitute the word ‘premium’ for the word ‘bonanza.’ Assuming that these revisions are made promptly, this Division does not believe that the management may rely on Rule 14a-8(c)(3) as a basis for omitting this paragraph.”).

55. See, e.g., Coca-Cola Co., SEC No-Action Letter, 1980 WL 17624, at *4 (Mar. 17, 1980) (finding statement was misleading due to absence of “adequate substantiation”).

56. Thus, a no-action letter found as “vague and indefinite” a proposal seeking to require that persons own not “less than 1,000 shares of the common stock of the Corporation may be elected to the Board of Directors” because the proponent did not clarify whether ownership “must be actual ownership or whether beneficial ownership would be sufficient.” Niagara Mohawk Power Corp., SEC No-Action Letter, 1990 WL 286068, at *1–2 (Feb. 16, 1990). The proponent did, however, receive the right to correct the “defect.” See *id.* at *1; see also Sears, Roebuck & Co., SEC No-Action Letter, 1989 WL 245570, at *1 (Feb. 17, 1989) (proposal calling for ownership of at least 2000 shares of common or preferred stock “vague and indefinite” for failing to specify whether ownership “may be aggregated or if ownership of derivative instruments . . . would be sufficient”).

57. In some cases, the exclusion applied to proposals that provided shareholders with additional, potentially material, information. Thus, where the company, rather than shareholders, had the right to determine whether to include the identity of the proponent and the number of shares held, efforts to include the same information in the proposal or supporting statement was treated as “false and misleading.” See, e.g., Kimberly-Clark Corp., SEC No-Action Letter, 1988 WL 233966, at *1 (Jan. 12, 1988) (“There appears to be some basis for your view that the reference to the number of Company securities held by the proponent may be omitted Under the circumstances, this Division will not recommend any enforcement action to the Commission if the Company omits ‘1,050,200’ from the first line of the first paragraph of the supporting statement in its proxy material.”).

as confusing⁵⁸ or irrelevant⁵⁹ or inconsistent.⁶⁰ So were references considered “vague and indefinite.”⁶¹ The editing process addressed word us-

58. Penn Cent. Corp., SEC No-Action Letter, 1981 WL 26271, at *1 (Mar. 18, 1981) (“There appears to be some basis for your opinion that the proposed report, by requiring disclosure of ‘all’ payments to governmental entities, including such benefits as revenues on sales, and loan payments, as well as regulatory burdens, could be confusing to shareholders.”); *see also* CBS Corp., SEC No-Action Letter, 2015 WL 274189, at *22 (Mar. 10, 2015) (“Because of the confusing message of the Proposal, a reasonable shareholder would be uncertain as to whether he or she is being asked to vote on a proposal related to management’s fulsome review of any and all Company policies related to any and all human rights or a proposal related to management’s review of Company policies to evaluate anti-retaliation protections for employees taking part in government.”); Knight-Ridder, Inc., SEC No-Action Letter, 1995 WL 765455, at *1 (Dec. 28, 1995) (“There appears to be some basis for your view that the paragraphs five, six and seven of the supporting statement may be confusing and misleading to shareholders because they are unrelated to the subject matter of the proposal in violation of rule 14a-8(c)(3).”).

59. *See, e.g.*, Long Island Lighting Co., SEC No-Action Letter, 1976 WL 11012, at *20 (Mar. 9, 1976) (“There also appears to be some basis for your counsel’s view that the entire supporting statement for the proposal may be omitted under Rule 14a-9 because it deals with a matter (viz., the compensation of certain officers and directors) that does not seem to have any relevance to the subject matter of the proposal. Accordingly, it could be both confusing and misleading to the company’s security holders.”).

60. *See, e.g.*, Sears, Roebuck & Co., SEC No-Action Letter, 1992 WL 55821, at *1 (Mar. 16, 1992) (“Accordingly, the second paragraph of the supporting statement should either be deleted or the discussion revised so that the object of the distribution—apparently all the Company’s non-merchandizing groups—is consistently referred to throughout.”).

61. The standard at least initially applied only where a proposal was “so inherently vague and indefinite that the shareholders voting upon the proposals would not be able to determine with any reasonable certainty exactly what actions or measures the Company would take in the event the proposals were implemented.” *See* *EI du Pont de Nemours & Co.*, SEC No-Action Letter, Fed. Sec. L. Rep. ¶ 81,122, 1977 WL 11653, at *6 (Feb. 8, 1977); *In re Am. Tel. & Tel. Co.*, SEC No-Action Letter, 1977 WL 13620, at *5 (Jan. 18, 1977) (“[W]e agree with your view that the descriptive term ‘representative of the general public’ is so vague and indefinite that the shareholders may not know what type of person they are being asked to vote upon for possible membership on the Company’s board of directors.”); *see also* Xerox Corp., SEC No-Action Letter, 1977 WL 12825, at *7 (Mar. 10, 1977) (concurring in the view that proposal was “so inherently vague and indefinite that the shareholders voting upon the proposal would not be able to determine with any reasonable certainty exactly what action or measures the Company would take in the event the proposal were implemented” and that proposal “may be misleading, in that, any action ultimately taken by the Company upon the implementation of the proposal could be quite different from the type of action envisioned by the shareholders at the time their votes were cast”); Coca-Cola Co., SEC No-Action Letter, 1977 WL 11671, at *5 (Feb. 24, 1977) (finding “some basis” for the opinion that the proposal was “so inherently vague and indefinite that the shareholders voting upon the proposal would not be able” to determine with “any reasonable certainty exactly what action” would be taken “in the event the proposal were implemented”). The language derived from an early formulation developed by the Commission and found by a court not to be arbitrary. *See* *Dyer v. SEC*, 287 F.2d 773, 781 (8th Cir. 1961) (“[I]t appears to us that the proposal, as drafted and submitted to the company, is so vague and indefinite as to make it impossible for either the board of directors or the stockholders at large to comprehend precisely

age,⁶² small mistakes,⁶³ typos,⁶⁴ improper use of tenses,⁶⁵ and colorful adjectives.⁶⁶

what the proposal would entail.”). The interpretation found its way into the rule even before the adoption of the exclusion. *See* Long Island Lighting Co., SEC No-Action Letter, 1973 WL 9145, at *5 (Feb. 28, 1973) (arguing proposal was excludable under *Dyer* “because it is unclear as to what is being proposed”); *see also* Phillips Petroleum Co., SEC No-Action Letter, 1974 WL 8856, at *6–7 (Feb. 19, 1974) (relying on *Dyer* and seeking exclusion on the basis of “vague and indefinite” language).

62. *See, e.g.*, Integrated Res., Inc., SEC No-Action Letter, 1986 WL 66947, at *1, 4 (June 9, 1986) (where supporting statement provided that “Since each of our top officers receives between \$1,303,552 and \$1,803,303 in annual compensation” the no action letter agreed that the company could omit the word “Since” in order “to avoid any confusion that might otherwise result”).

63. *See, e.g.*, Wash., Water Power Co., SEC No-Action Letter, 1993 WL 85656, at *1 (Mar. 22, 1993) (“The reference to book value in paragraph number one should be revised from 5% to 5.8 percent.”); Chevron Corp., SEC No-Action Letter, 1988 WL 235380, at *1 (Dec. 16, 1988) (authorizing proponent to revise proposal to “make the reference to ‘beneficial owner’ plural, as it appears from the remainder of the proposal and supporting statement that this was his intent”); Barris Indus. Inc., SEC No-Action Letter, 1988 WL 235023, at *2 (Sept. 30, 1988) (finding “some basis for . . . view that the language ‘only one independent outside Director’ in the first sentence of the eighth paragraph of the supporting statement may be excluded under Rule 14a-8(c)(3). Assuming, however, that the proponent promptly amends the referenced sentence to refer to two independent outside directors, this Division does not believe that the Company may rely on Rule 14a-8(c)(3)”); *see also* Coll. Ret. Equities Fund, SEC No-Action Letter, 2003 WL 23306671, at *1 (Sept. 25, 2003) (“Amend the reference in the seventh paragraph to the ‘TIAA-CREF Policy Statement on Corporate Governance’ to refer to the ‘CREF Policy Statement on Corporate Governance’”).

64. *See, e.g.*, PepsiCo, Inc., SEC No-Action Letter, 1990 WL 286195, at *1 (Mar. 9, 1990) (“There appears to be some basis for your view that the third ‘Whereas’ clause is false and, therefore, excludable under Rule 14a-8(c)(3). It appears, however, that this defect could be cured if the proponent corrects the apparent typographical error ‘17,5000’ by changing such number to ‘17,500.’”).

65. *See, e.g.*, Wis. Power & Light Co., SEC No-Action Letter, 1980 WL 14331, at *3 (Feb. 14, 1980) (“Although there appears to be some basis for your view that the third ‘WHEREAS’ clause of the proposal is confusingly worded, we note that [the proponent] has stated that the penultimate word in the clause should be amended to read ‘increase,’ rather than ‘increased.’ In light of this amendment, the staff is unable to conclude that management may omit the clause from its proxy material.”).

66. *See, e.g.*, FPL Grp., Inc., SEC No-Action Letter, 1991 WL 178551, at *1, 2 (Mar. 12, 1991) (in supporting statement no action letter agreed that “[t]he word ‘disastrous’ appearing in the fifth paragraph should be deleted”).

Proposals could be challenged as a result of the complete absence of citations⁶⁷ or the presence of incorrect citations,⁶⁸ the reliance on references no longer current,⁶⁹ and the failure to identify organizations or entities.⁷⁰ Edits included the need to replace a paraphrased statement with a direct quote.⁷¹ A proposal referring to “majority” support of shareholders had to be rewritten to state a “majority of the votes cast.”⁷²

Negative references about the issuer or management often received particular attention. A no-action letter characterized the statement “a glaring violation of corporate democracy” as misleading.⁷³ Calling leader-

67. See, e.g., Weyerhaeuser Co., SEC No-Action Letter, 2004 WL 253681, at *1 (Feb. 6, 2004) (requiring proponent to “provide a citation”); Am. Elec. Power Co., SEC No-Action Letter, 2002 WL 171251, at *1 (Jan. 16, 2002) (proposal will not be treated as false and misleading where proponent “provide[s] factual support for” specified paragraph); RJ Reynolds Tobacco Holdings, Inc., SEC No-Action Letter, 2000 WL 283138, at *1 (Mar. 7, 2000) (requiring proponent to provide specified citations); see also Northrop Grumman Corp., SEC No-Action Letter, 2001 WL 203928, at *1 (Feb. 16, 2001) (requiring proponent to provide “factual support”).

68. See, e.g., Raytheon Co., SEC No-Action Letter, 1999 WL 126406, at *1 (Mar. 9, 1999) (stating that proposal would not be false and misleading where references to article in the *New York Times* or *Aviation Week* were “deleted”). Alternatively, they had to be properly characterized. See, e.g., Weyerhaeuser, 2004 WL 253681, at *1 (requirement that reference to article in the *Wall Street Journal* be revised to clarify “that the article refers to an opinion article”).

69. See, e.g., PACCAR Inc., SEC No-Action Letter, 1999 WL 98612, at *1 (Feb. 22, 1999) (proposal could avoid being misleading by updating statement regarding a strike “to reflect the current status of the strike”); see also Northrop Grumman, 2001 WL 203928, at *1 (requiring revision of statement about lawsuit “to indicate the current status of the lawsuit”); Occidental Petroleum Corp., SEC No-Action Letter, 1993 WL 4457, at *1 (Jan. 6, 1993) (“[T]he term ‘current’ may be vague given the fact that the proxy materials will be distributed several months subsequent to the date of the proposal and supporting statement . . .”).

70. See, e.g., Marriott Int’l, Inc., SEC No-Action Letter, 2002 WL 597336, at *1 (Mar. 19, 2002) (“specifically identify the institutional investors that the proponent refers to”); Northrop Grumman, 2001 WL 203928, at *1 (where proposal referred to “a respected proxy advisory firm,” proponent required to “specifically identify the proxy advisory firm”); Staten Island Bancorp, Inc., SEC No-Action Letter, 2000 WL 354382, at *1 (Mar. 21, 2000) (“supporting statement may be false or misleading under rule 14a-9” unless proponent identifies “the institutions that comprise the ‘regional peer group’ and the ‘asset-size peer group’”); Texaco, Inc., SEC No-Action Letter, 1993 WL 93602, at *1 (Mar. 25, 1993) (statement of support is “potentially false and misleading in contravention of Rule 14a-9” unless proponent deletes reference to “[f]ive other known cases” or “clearly” identifies the cases).

71. See, e.g., Weyerhaeuser, 2004 WL 253681, at *1 (encouraging company to revise sentences to “directly quote the sentence from the source”).

72. See Champion Int’l Corp., SEC No-Action Letter, 1990 WL 286230, at *1 (Mar. 13, 1990) (“There appears to be some basis for your view that the statement in the fifth ‘Whereas’ clause that ‘similar proposals received a majority at some companies’ may be misleading. However, it appears that this defect can be cured if such statement is revised to read ‘similar proposals received a majority of the votes cast at some companies.’”).

73. See Astrex, Inc., SEC No-Action Letter, 1978 WL 12823, at *5 (June 7, 1978).

ship “inept” could only remain if recast as an opinion.⁷⁴ False and misleading captured a reference to financial materials “significantly understat[ing]” values⁷⁵ and the claim that “Trustees paint an overly rosy financial picture.”⁷⁶

3. *Right to Cure*

The broad application of the exclusion was tempered through the addition of a right to cure.⁷⁷ An administrative graft, proponents often had an opportunity to fix the challenged language. Although surfacing occasionally through the 1970s,⁷⁸ application of the right to revise expanded as a result of a deliberate policy decision⁷⁹ that was approved by

74. See Amax Inc., SEC No-Action Letter, 1985 WL 52080, at *1 (Feb. 13, 1985).

75. Cent. Jersey Indus., Inc., SEC No-Action Letter, 1980 WL 14305, at *1 (Mar. 27, 1980).

76. Cal. Real Estate Inv. Trust, SEC No-Action Letter, 1980 WL 14299, at *2 (Mar. 27, 1980).

77. The right predated the adoption of the exclusion. See Travelers Corp., SEC No-Action Letter, 1974 WL 8836, at *7 (Jan. 22, 1974) (“There appears to be some basis for your opinion that the proposal, as revised, may be omitted from the company’s proxy material because it is vague and indefinite. That is, the word ‘significant,’ as used in the phrase ‘significant quantities of goods and services,’ is subject to varying interpretations because there is no precise definition for it in the context of the proposal Under the circumstances, unless the proponent promptly revises the parts of the proposal and supporting statement mentioned above to cure the defects existing therein, this Division will not recommend any action to the Commission if the proposal and related supporting statement are omitted from the company’s proxy material.”); see also Ipco Hosp. Supply Corp., SEC No-Action Letter, 1974 WL 8327, at *3 (Aug. 16, 1974) (“There does appear, however, to be some basis for your view that the term ‘total annual budgeted financing’ used in the proposal is unclear in that it is not known whether the proponent is referring to total annual budgeted expenditures, or merely to the amount of financing, if any, that the company may budget for any one year. Accordingly, unless the proponent promptly revises the part of the proposal mentioned in the preceding sentence to cure the ambiguity therein, this Division will not recommend any enforcement action to the Commission if the proposal is omitted from the company’s proxy material.”).

78. See, e.g., Div. of Corp. Fin., Summary of Interpretations, Commission Minute re: American Telephone and Telegraph Company, at 10 (Jan. 31, 1964), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1960/1960_1964_Interprt_Corp_Finance.pdf [<https://perma.cc/MHH7-B5Z7>] (“Commission concurred with Division that proposal should be included if the words ‘and impartial’ are deleted since New York State Law requires inspectors act with ‘strict impartiality.’”); *Id.* at 216 (noting stockholder proposals providing for secret voting not subject to exclusion “after further revision of language”).

79. See Statement of Peter J. Romeo, SEC Official, to SEC Historical Society, at 6 (Feb. 20, 2014), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/2010/2014_0220_Statement_RomeoT.pdf [<https://perma.cc/A593-3FLR>] (“Innovative ways sometimes were found in these discussions to allow more proposals to be included in proxy statements than had previously been the case. One such method was to allow the proponent of a proposal that was potentially false or misleading in relatively minor

the Commission.⁸⁰ As a result, no-action letters characterizing statements as false and misleading often allowed shareholders to make revisions and remove the offending language.⁸¹

The extent of the revisions varied. Leaving little discretion, the no-action letters often provided specific instructions on the how to handle the concerns. Language would need to be rewritten as specified or omitted entirely. Statistics sometime had to be described as “approximation[s]”⁸² and statements as opinions.⁸³ Thus, a description of a company’s bylaws as “not shareholder friendly” was viewed as false and misleading unless characterized as an opinion.⁸⁴

respects to revise the proposal to eliminate the concerns raised by the company. Previously, no ‘second bite at the apple’ was permitted to proponents in these situations.”).

80. See Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12999, 1976 WL 160347, at *5 (Nov. 22, 1976) (“[T]he Commission wishes to reiterate a view that its staff has expressed informally on many occasions in the past. That is, changes to a timely submitted proposal or supporting statement may be made by the proponent after the timeliness deadline has passed, provided the changes are minor in nature and do not alter the substance of the proposal. Examples of such changes would be a change in the form of the proposal to bring it into accord with the requirements of the applicable state law, or a change in the proposal or supporting statement to revise or delete misleading statements contained therein.”).

81. See, e.g., Memorandum from Bill Morley, to John Huber & Linda Quinn, at 2 (Nov. 16, 1983), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1983_1116_StatisticalShareholder.pdf [<https://perma.cc/5SNX-EBAJ>] (“In addition to the five proposals excluded in their entirety under Rule 14a-8(c)(3), that Rule was cited and relied upon in almost all of the twenty-seven cases where proposals were required to be revised before they could be included.”).

82. Boeing Co., SEC No-Action Letter, 1987 WL 107646, at *1 (Feb. 19, 1987) (“There appears to be some basis for your view that the language ‘only 350 are Catholic’ in the second ‘whereas’ clause may be misleading in that it states as fact information tha[sic] appears reasonably to be subject to dispute. It appears, however, that this defect would be cured if the clause were modified to state the figure given as an approximation based on the information available to the proponent.”); see Healthway Sys., Inc., SEC No-Action Letter, 1988 WL 234171, at *1 (Mar. 25, 1988) (“[T]here appears to be some basis for your view that the sentences containing the figures ‘32 million,’ ‘\$4.5 million,’ ‘36.5 million,’ and ‘between \$17 to \$18’ may be excluded under Rule 14a-8(c)(3), unless those sentences are amended to indicate that each of these figures is an approximation.”).

83. See TRW Inc., SEC No-Action Letter, 1999 WL 64618, at *1 (Feb. 11, 1999) (proposal should not be misleading where statements “recast as the proponent’s opinion”); Dayton Power & Light Co., SEC No-Action Letter, 1980 WL 15267, at *4 (Feb. 28, 1980) (noting that proposal should be “promptly revised to add, where appropriate, the words ‘in our opinion,’ or some similar expression, to indicate that the statements therein represent the personal opinions of the proponent”); Wis. Power & Light Co., SEC No-Action Letter, 1980 WL 14331, at *4 (Feb. 14, 1980) (“With respect to the second and third sentences of the first paragraph of the supporting statement, there appears to be some basis for your view that these sentences express opinions of the proponents without being designated as such.”).

84. See SI Handling Sys., Inc., SEC No-Action Letter, 2000 WL 565125, at *1 (May 5, 2000) (“In our view, the statement that ‘the current By-Laws are not shareholder friendly’ must be recast as the proponent’s opinion.”).

The mandatory revisions could involve wordsmithing. In one instance, the proponent had to replace a reference to “many” with “some.”⁸⁵ In another, “associate” was to be changed to “colleague”⁸⁶ and “policy” to “objective.”⁸⁷ Reference to a third-party report required inclusion of the date.⁸⁸

No-action letters sometimes instructed the issuer to make the edits.⁸⁹ In general, this occurred where the changes involved straightforward omissions.⁹⁰ In other instances, proponents had the responsibility to re-

85. See Tri-Cont'l Corp., SEC No-Action Letter, 2004 WL 541193, at *3 (Mar. 15, 2004) (highlighting that the offending phrase stated that “many corporations have adopted cumulative voting” (internal quotations omitted)).

86. Barris Indus. Inc., SEC No-Action Letter, 1988 WL 235023, at *1 (Sept. 30, 1988) (“Assuming the proponent promptly revises the final clauses of the second sentence of the first paragraph of supporting statement and the first sentence of the eighth paragraph of the supporting statement to replace ‘associates’ with ‘colleagues,’ this Division does not believe that the Company may rely on Rule 14a-8(c)(3) as a basis for omitting those clauses.”); see Hous. Indus. Inc., SEC No-Action Letter, 1990 WL 286282, at *1 (Mar. 28, 1990) (“It appears, however, that this defect could be cured if the word ‘would’ appearing after the word ‘money’ were changed to ‘could.’ Assuming that the proposal is revised in the foregoing manner within seven calendar days of receipt of this letter, the Division does not believe that the proposal may be omitted under Rule 14a-8(c)(3).”).

87. Emerson Elec. Co., SEC No-Action Letter, 1980 WL 17387, at *2 (Dec. 12, 1980) (“[T]here does appear to be some basis for your opinion that the third whereas is false and misleading because ‘the Company has never adopted a policy’ as that referred to in the clause. However, we believe that this defect could be cured if the word ‘objective’ is substituted for ‘policy.’”).

88. See Chevron Corp., SEC No-Action Letter, 1991 WL 176658, at *1 (Feb. 13, 1991) (“There appears to be some basis, however, for your view that certain portions of the supporting statement accompanying the proposal may be deleted under rule 14a-8(c)(3) unless revised as follows: the first sentence in the first paragraph of the supporting statement should state ‘1988’ in lieu of 1989 and the last sentence in the third paragraph should indicate the date of the referenced study (viz, 1986).”).

89. See, e.g., Men’s Wearhouse, Inc. SEC No-Action Letter, 2002 WL 833595, at *1 (Mar. 25, 2002) (“[U]nless the proponents provide The Men’s Wearhouse with a proposal and supporting statement revised in this manner, within seven calendar days after receiving this letter, we will not recommend enforcement action to the Commission if The Men’s Wearhouse omits only these portions of the supporting statement from its proxy materials in reliance on rule 14a-8(i)(3).”); see also Occidental Petroleum Corp., SEC No-Action Letter, 1993 WL 4457, at *1 (Jan. 6, 1993) (“[U]nless the proponent revises the supporting statement [as specified] . . . the Division will not recommend any action if those portions of the statement are omitted from the Company’s proxy materials.”).

90. See, e.g., Emerging Ger. Fund, Inc., SEC No-Action Letter, 1998 WL 890121, at *3 (Dec. 22, 1998) (“[I]f [proponent] does not revise the statement indicated within seven calendar days after receiving this letter, we would not recommend enforcement action against the Fund if this paragraph were omitted from the Fund’s proxy soliciting materials in reliance upon rule 14a-8(i)(3).”); see also Northrop Grumman Corp., SEC No-Action Letter, 2001 WL 203928, at *1 (Feb. 16, 2001) (“[U]nless the proponent provides Northrop Grumman with a proposal and supporting statement revised in this manner, within seven calendar days after receiving this letter, we will not recommend enforcement action to the

write statements or to delete phrases,⁹¹ sentences,⁹² and paragraphs.⁹³ The editing instructions⁹⁴ sometimes came with a deadline.⁹⁵ Inadequate revisions could be a basis for exclusion⁹⁶ of either the proposal⁹⁷ or the supporting statement.⁹⁸

Not every proponent received a right to cure. Omission of the entire proposal could occur for submissions deemed false and misleading “in their entirety.”⁹⁹ Proposals requiring “highly subjective” determinations

Commission if Northrop Grumman omits only these portions of the proposal and supporting statement from its proxy materials in reliance on rule 14a-8(i)(3).”).

91. *See, e.g.*, Northrop Grumman Corp., SEC No-Action Letter, 2001 WL 203928, at *1 (Feb. 16, 2001) (requiring deletion of “phrases”).

92. *See, e.g.*, Cendant Corp., SEC No-Action Letter, 2004 WL 187657, at *1 (Jan. 16, 2004) (requiring deletion of specified sentence from the supporting statement).

93. *See, e.g.*, IBM Corp., SEC No-Action Letter, 2001 WL 1723896, at *1 (Dec. 21, 2001) (requiring deletion of specified paragraphs).

94. Thus, shareholders failing to note a possible “conflict with the indemnification[s] . . . of the Company’s by-laws” were instructed to “amend[] the proposal so as to eliminate [the] defect.” Fla. Power Corp., SEC No-Action Letter, 1981 WL 26583, at *2 (Jan. 21, 1981).

95. The common time period was seven calendar days. *See, e.g.*, Dominion Res., Inc., SEC No-Action Letter, 1991 WL 178477, at *1 (Feb. 15, 1991) (“Assuming the Proponent revises the proposal in the manner indicated within seven calendar days of receipt of this response, the staff does not believe that the Company may rely on Rule 14a-8(c)(3) as a basis for omitting the proposal from its proxy materials.”); *see also* Pinnacle W. Capital Corp., SEC No-Action Letter, 1991 WL 178547, at *1 (Mar. 11, 1991) (“Assuming the Proponent provides the Company with a proposal revised in the manner indicated, within seven calendar days after receipt of this response, the staff does not believe that rule 14a-8(c)(3) may be relied on as a basis to omit the proposal from the Company’s proxy materials.”).

96. *See, e.g.*, Fla. Power Corp., SEC No-Action Letter, 1979 WL 13865, at *1 (Feb. 6, 1979) (“[I]n the staff’s view, the proposal as revised on February 3 would also be excludable in reliance upon Rule 14a-8(c)(3).”).

97. *See, e.g.*, Am. Home Prods. Corp., SEC No-Action Letter, 1977 WL 11667, at *6 (Feb. 23, 1977) (“If, however, revisions are not promptly made by the proponent, this Division will not recommend any action to the Commission if the proposal and supporting statement are excluded from the Company’s proxy material.”); *see also* Am. Elec. Power Co., SEC No-Action Letter, 1977 WL 15064, at *10 (Feb. 23, 1977) (same).

98. *See, e.g.*, Staten Island Bancorp, Inc., SEC No-Action Letter, 2000 WL 354382, at *1 (Mar. 21, 2000) (“[U]nless [proponent] provides Staten Island with a proposal revised in this manner, within seven days after receiving this letter, we will not recommend enforcement action to the Commission if Staten Island omits all of the supporting statement from its proxy materials in reliance on rule 14a-8(i)(3).”); TF Fin. Corp., SEC No-Action Letter, 1999 WL 38380, at *1 (Jan. 28, 1999) (same).

99. *See* Proposed Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals to Security Holders, Exchange Act Release No. 19135, 1982 WL 600869, at *13 (Oct. 14, 1982) (“As with any preliminary proxy material, the proponent is given the opportunity to amend his submission to correct the Rule 14a-9 problems, except where it is clear that the proposal and supporting statement in their entirety are false or misleading or otherwise are so vague and ambiguous that the issuer and its security holders would not be able to determine what action the proposal is contemplating.”).

were at risk.¹⁰⁰ Similarly, the right to correct would not apply where the matter required “detailed and extensive editing.”¹⁰¹

III. THE ADMINISTRATIVE REWRITING OF RULE 14A-8(i)(3)

Application of the exclusion entailed a balance. The broad interpretation allowed the exclusion to be used to address a variety of concerns presented by proposals otherwise unaddressed by the rule. The edits could improve quality, ensure better written proposals, and reduce confusion. In at least some cases, the revisions rendered the presentation more neutral and less critical of issuer behavior.

At the same time, the no-action letters balanced the approach with a broad right to cure. Shareholders might disagree with the edits but at least could avoid exclusion of their proposal by making the mandated changes. The administrative graft also represented a form of equal treatment. Issuers pre-filing proxy materials received a similar opportunity.¹⁰²

The encrypted nature of the editing function meant that the boundaries of the interpretation were never clearly articulated. In particular, the tipping point for proposals that could be excluded rather than rewritten remained uncertain. As a result, issuers had an incentive to test constantly the reach of the exclusion, increasing the number of requests for no action relief.

A. *The Administrative Revision*

The editing function and the encrypted nature of the approach increased the agency’s workload. Almost any term or phrase could be chal-

100. See Philip Morris Cos., SEC No-Action Letter, 1991 WL 176624, at *1 (Feb. 7, 1991) (explaining that proposal was “vague, indefinite and, therefore, potentially misleading” where proposal “appears to involve highly subjective determinations”); Am. Tel. & Tel. Co., SEC No-Action Letter, 1990 WL 285820, at *1 (Jan. 12, 1990) (contending that proposal was “vague, indefinite and, therefore, potentially misleading” where implementation “would require the Company to make highly subjective determinations”).

101. See SEC Staff Legal Bulletin No. 14, *supra* note 15, at 20 (“[W]hen a proposal and supporting statement will require detailed and extensive editing in order to bring them into compliance with the proxy rules, we may find it appropriate for companies to exclude the entire proposal, supporting statement, or both, as materially false or misleading.”).

102. See Memorandum from Linda Quinn, Bill Morley & John Gorman, to Lee Spencer & John Humber, *supra* note 33, at 17 (“We do not believe that any change is necessary in the provision or in the prevailing staff practice. In this regard it should be noted that the staff practice permitting proponents to make changes to correct statements which would be violative of Rule 14a-9 is consistent with the staff practice in reviewing preliminary proxy materials filed by issuers.”).

lenged as misleading or indefinite,¹⁰³ with some possibility of success.¹⁰⁴ As a result, the editing process evolved into a line-by-line, time-consuming review that amounted to an inefficient use of resources.¹⁰⁵ The invocation of the exclusion had become ubiquitous, with almost one-half of the no-action letters issued during the 2004 proxy season addressing subsection (i)(3)¹⁰⁶ and over ninety providing a right to revise.¹⁰⁷

Seeking to reduce the use of the exclusion, the Commission unilaterally adopted a more narrow interpretation. Conceding that the reigning approach had resulted in “an unintended and unwarranted extension of rule 14a-8(i)(3),”¹⁰⁸ a staff legal bulletin announced that statements would no longer be treated as false and misleading simply because of disagreements over accuracy or a purported absence of adequate support. Instead, the exclusion would apply only to statements that impugned character,¹⁰⁹ were objectively false,¹¹⁰ were “so inherently vague or indefinite” that the company and shareholders could not determine what the proposal required, or were “irrelevant . . . such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which she is being asked to vote.”¹¹¹

103. Thus, use of “vivid” words could subject a proposal to challenge. *See, e.g.,* Emerging Ger. Fund, Inc., SEC No-Action Letter, 1998 WL 890121, at *3 (Dec. 22, 1998) (“We disagree that the use of vivid words such as ‘cronies’ and ‘bailing out’ is false and misleading.”).

104. The no-action letter permitted the exclusion of a clause referring to a “significant increase” in earnings. *See* Hydron Tech., Inc., SEC No-Action Letter, 1997 WL 232587, at *2 (May 8, 1997) (“There appears to be some basis for your view that the fourth part of the proposal may be omitted under rule 14a-8(c)(3). The staff notes in particular that, in this context, the phrase ‘significant increase’ is vague and indefinite. Accordingly, the Division is of the view that the fourth part of the proposal may be omitted under rule 14a-8(c)(3).”).

105. *See, e.g.,* SEC Staff Legal Bulletin No. 14B, *supra* note 17 (“[M]any companies have begun to assert deficiencies in virtually every line of a proposal’s supporting statement as a means to justify exclusion of the proposal in its entirety. Our consideration of those requests requires the staff to devote significant resources to editing the specific wording of proposals and, especially, supporting statements.”).

106. *See id.* (“During the last proxy season, nearly half the no-action requests we received asserted that the proposal or supporting statement was wholly or partially excludable under rule 14a-8(i)(3).”).

107. *See app. A.*

108. SEC Staff Legal Bulletin No. 14B, *supra* note 17 (“Unfortunately, our discussion of rule 14a-8(i)(3) in SLB No. 14 has caused the process for company objections and the staff’s consideration of those objections to evolve well beyond its original intent.”).

109. *See, e.g., id.* (“statements directly or indirectly impugn character, integrity, or personal reputation, or directly or indirectly make charges concerning improper, illegal, or immoral conduct or association, without factual foundation”).

110. *See, e.g., id.* (“[T]he company demonstrates objectively that a factual statement is materially false or misleading.”).

111. *Id.* (“[T]he resolution contained in the proposal is so inherently vague or indefinite that neither the stockholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with

At least a portion of the administrative approach was not encrypted. Issuers and proponents did not need to divine the change through an analysis of no-action letters applying the policy. Instead, the use of a staff legal bulletin created immediate awareness of the change. Issuers and shareholders could, as a result, immediately change their behavior to reflect the approach. In fact, the number of proposals addressing the exclusion fell the following year.¹¹²

B. *Elimination of the Right to Cure*

The bulletin, however, only revealed a portion of the administrative shift. Significant matters remained encrypted. First, the bulletin indicated a widespread shift in, and narrowing of, the interpretation of (i) (3). In fact, application would reveal that the most significant change occurred with respect statements challenged as false and misleading. No-action letters addressing these sorts of allegations largely ceased.

Challenges to statements or proposals as vague, irrelevant, or confusing, however, were treated differently and continued to be a basis for exclusion. Similarly, encryption masked significant changes to the right to revise. The bulletin acknowledged the “long-standing” nature of the right and the traditional inapplicability to proposals requiring “detailed and extensive editing.”¹¹³ Application, however, would reveal that, in fact, the right to cure had been almost entirely eliminated.

In the decade or more following issuance of the bulletin, revisions were permitted in only a small number of instances. Moreover, shareholders received little or no discretion to fashion the changes. In *Rite Aid Corp.*,¹¹⁴ for example, the issuer received the right to delete a sentence in the supporting statement indicating that “the SEC fully supports this Proposal.”¹¹⁵ In *General Electric*,¹¹⁶ the issuer was allowed to exclude an image as irrelevant.¹¹⁷

any reasonable certainty exactly what actions or measures the proposal requires—this objection also may be appropriate where the proposal and the supporting statement, when read together, have the same result . . .”).

112. See app. A.

113. See SEC Staff Legal Bulletin No. 14, *supra* note 15, at 22 (“If the proposal contains specific statements that may be materially false or misleading or irrelevant to the subject matter of the proposal, we may permit the shareholder to revise or delete these statements. Also, if the proposal or supporting statement contains vague terms, we may, in rare circumstances, permit the shareholder to clarify these terms.”); see also app. A.

114. SEC No-Action Letter, 2015 WL 332191 (Mar. 13, 2015).

115. *Id.* at *3.

116. SEC No-Action Letter, 2017 WL 821664 (Feb. 23, 2017).

117. See *id.* at *1; see also Kroger Co., SEC No-Action Letter, 2017 WL 697559, at *1 (Mar. 27, 2017) (“There appears to be some basis for your view, however, that the paragraph in the supporting statement regarding neonics is irrelevant to a consideration of the subject matter of the proposal, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which he or she is being asked to vote. Accordingly, we will not recommend en-

In other cases, edits had unique explanations that did not suggest a broad right to revise. For example, in one instance, the proposal was subject to revision because of intervening regulatory changes.¹¹⁸ Another involved language that had been subject to exclusion in an earlier no-action letter at the same company.¹¹⁹

IV. THE CONSEQUENCES OF ENCRYPTED INTERPRETATIONS

Elimination of the right to cure probably had little immediate impact. By narrowing the types of statements that would be treated as false and misleading, fewer revisions were necessary. In the first two years after announcement of the new policy, no-action letters permitted the omission of only eight proposals under subsection (i)(3). The decline, however, proved temporary. By 2014, use of the exclusion had again become widespread,¹²⁰ with twenty-seven proposals omitted under subsection (i)(3).

In the post-2004 period, the exclusion mostly applied to proposals characterized as “vague and indefinite” rather than false and misleading. Moreover, despite the purpose of the 2004 release, the concept of vague and misleading expanded rather than contracted. The approach applied to proposals with undefined terms and concepts, even those widely known. Nor for the most part did proponents receive the right to make revisions and include missing definitions or explanations.

forcement action to the Commission if Kroger omits only this portion of the supporting statement from its proxy materials in reliance on rule 14a-8(i)(3).”).

118. See Sara Lee Corp., SEC No-Action Letter, 2006 WL 2664139, at *1 (Sept. 11, 2006) (“[B]ecause the requirements for the Compensation Committee Report were revised following the deadline for submitting proposals, we believe that the proposal may similarly be revised to make clear that the advisory vote would relate to the description of the company’s objectives and policies regarding named executive officer compensation that is included in the Compensation Discussion and Analysis. Accordingly, a proposal that is revised to replace the phrase ‘report of the Compensation and Employee Benefits Committee’ with the phrase ‘the Compensation Discussion and Analysis’ may not be omitted under rule 14a-8(i)(3).”).

119. See Nicor, Inc., SEC No-Action Letter, 2005 WL 22682, at *1 (Jan. 3, 2005). The decision was, apparently, designed to ensure consistency with prior no-action letters addressing the same language in an earlier proposal submitted to the same company. See *id.* at *4 (“Furthermore, the portions quoted below are the same or substantially similar to false and misleading statements made by the Proponent in the shareholder proposal submitted by the Proponent for Nicor’s 2004 Annual Meeting of Stockholders. These statements were revised in Nicor’s proxy materials for its 2004 Annual Meeting following issuance of a Staff no-action letter and, nonetheless, the Proponent has included the same or similar language in this Proposal.”).

120. See, e.g., *Shareholder Proposal Developments During the 2014 Proxy Season*, GIBSON DUNN 2 (June 25, 2014), <http://www.gibsondunn.com/publications/documents/Shareholder-Proposal-Developments-During-2014-Proxy-Season.pdf> [<https://perma.cc/3KSB-5S32>] (“Of the shareholder proposals for which no-action relief was denied, 58% were challenged as being either vague or false and misleading under Rule 14a-8(i)(3), making these arguments the most frequently rejected arguments, as they were during 2012–2013.”).

A. *The Right to Cure and Proposals Deemed “Vague and Indefinite”*

Even before the 2004 changes, proposals considered “vague and indefinite” were subject to exclusion. The issue often arose in connection with the use of undefined technical terms or external standards.¹²¹ Thus, proposals were excluded that called for a “GRI-based sustainability report”¹²² or the use of “SA8000 Social Accountability Standards.”¹²³ The standard applied to references to obscure code sections¹²⁴ or FASB guidelines.¹²⁵ Even the inclusion of definitions or explanations did not insulate a proposal from challenge to the extent not “fairly summarize[d].”¹²⁶

Shareholders, however, often had a right to revise proposals to add appropriate definitions¹²⁷ or to clarify relevant language.¹²⁸ References

121. See Amoco Corp., SEC No-Action Letter, 1989 WL 245779, at *1 (Feb. 3, 1989) (“[W]e do not concur in your view that the reference to ‘a beneficial owner’ is so confusing as to make the proposal excludable under Rule 14a-8(c)(3)”); see also Dow Chem. Co., SEC No-Action Letter, 2005 WL 544210, at *1 (Feb. 28, 2005) (use of term “internal controls” not vague and misleading).

122. See Ryland Grp., Inc., SEC No-Action Letter, 2005 WL 148036, at *1 (Jan. 19, 2005) (proposal asking company to prepare “a GRI-based sustainability report” considered “vague and indefinite” and subject to exclusion without right to cure); Terex Corp., SEC No-Action Letter, 2004 WL 393992, at *1 (Mar. 1, 2004); ConAgra Foods, Inc., SEC No-Action Letter, 2004 WL 1489570, at *1 (July 1, 2004); Dean Foods Co., SEC No-Action Letter, 2004 WL 385738, at *1 (Feb. 25, 2004).

123. See Kohl’s Corp., SEC No-Action Letter, 2001 WL 267673, at *6 (Mar. 13, 2001) (concurring in the exclusion of a shareholder proposal in reliance on Rule 14a-8(i)(3) requesting implementation of the “SA8000 Social Accountability Standards”); see also TJX Cos., SEC No-Action Letter, 2001 WL 267667, at *11 (Mar. 14, 2001); McDonald’s Corp., SEC No-Action Letter, 2001 WL 278478, at *10 (Mar. 13, 2001).

124. See, e.g., AT&T Inc, SEC No-Action Letter, 2010 WL 673795, at *1 (Feb. 16, 2010) (concurring with the exclusion of a proposal that sought a report on, among other things, “grassroots lobbying communications as defined in 26 C.F.R. § 56.4911-2”).

125. See, e.g., Safescript Pharms., Inc., SEC No-Action Letter, 2004 WL 414589, at *2 (Feb. 27, 2004) (excluding proposal that called for “all options granted by the Company be expensed in accordance with FASB guidelines”).

126. See Revlon, Inc., SEC No-Action Letter, 2001 WL 267670, *2, 12 (Mar. 13, 2001).

127. There were exceptions. For example, a right to correct an external standard was not permitted where the proposal contained “inconsistent” references. This occurred, however, where the problem with the external standard was not the only linguistic issue arising under the proposal. See, e.g., Exxon Corp., SEC No-Action Letter, 1992 WL 18818, at *1 (Jan. 29, 1992) (noting that proposal including reference to directors who had taken “the company into bankruptcy or one of Chapter 7–11 or 13” included “numerous undefined and inconsistent phrases” including the reference to Chapter 13, which the company asserted was applicable “only to individuals”).

128. See Firestone Tire & Rubber Co., SEC No-Action Letter, 1978 WL 12094, at *6 (Nov. 2, 1978) (“[U]nless the proponent promptly revises the supporting statement so as to clarify the terms indicated above, this Division will not recommend any enforcement action to the Commission if the supporting statement is omitted from the Company’s proxy material. In considering our enforcement al-

to “direct and indirect compensation” and “executive perquisites” were “so vague as to render the proposal misleading” but shareholders could “promptly amend[] the proposal to cure the defects.”¹²⁹ A proponent was instructed to promptly “set forth . . . definitions” of the terms “fiduciary holdings” and “interlocking directorates.”¹³⁰ Definitions or clarifications were required of “lower levels of American manufacturers,”¹³¹ “public official,”¹³² “Nuclear freeze,”¹³³ and “value.”¹³⁴

ternatives, we have not found it necessary to reach the other bases for omission of the supporting statement which you have presented.”).

129. *See, e.g.*, Nuclear Data, Inc., SEC No-Action Letter, 1980 WL 15403, at *3 (Mar. 28, 1980).

130. Genuine Parts Co., SEC No-Action Letter, 1976 WL 10994, at *14 (Mar. 3, 1976) (“There does, however, appear to be some basis for your opinion and the opinion of your counsel that the terms ‘fiduciary holdings’ and ‘interlocking directorates’ used in the proposal are vague in that they may, without precise definitions thereof, be subject to varying interpretations by the company’s security holders. Accordingly, unless the proponent promptly expands the proposal to set forth his definitions of those terms, this Division will not recommend any enforcement action to the Commission if the proposal and related supporting statement are omitted from the company’s proxy material.”).

131. *See, e.g.*, Rogers Corp., SEC No-Action Letter, 1990 WL 286165, at *2 (Feb. 21, 1990) (“There appears to be some basis for your view that the assertion in the supporting statement that the Company’s ‘pre-tax earnings—measured against sales or equity—fluctuated at the lower levels of American manufacturers,’ may be omitted under Rule 14a-8(c)(3) on the basis that its imprecision may be misleading. It appears, however, that this defect could be cured if the proponent revises the supporting statement to define the ‘lower levels of American manufacturers’ so that shareholders will be able to assess the intended comparison. Assuming the proponent revises the statement in the foregoing manner within seven calendar days of receipt of this response, the Company may not omit it from its proxy material.”).

132. *See, e.g.*, Columbia Pictures Indus., Inc., SEC No-Action Letter, 1977 WL 15155, at *3 (July 29, 1977) (“There appears to be some basis for your opinion that parts of the proposal may be vague or indefinite in their present form, and should, therefore, be clarified by the proponent. Specifically, the term ‘public official’ is not defined therein . . .”).

133. *See, e.g.*, Gen. Dynamics Corp., SEC No-Action Letter, 1983 WL 29879, at *2 (Mar. 17, 1983) (“There appears to be some basis for counsel’s opinion that the second paragraph of the proposal is vague and ambiguous in violation of Rule 14a-8(c)(3) unless the term ‘Nuclear Freeze’ is defined therein. [Proponent], in his March 10, 1983 letter on the matter, has indicated the Proponents willingness to provide the definition in the proposal. Assuming the proposal is promptly amended in the manner indicated, we do not believe that management may omit the second paragraph of the proposal.”).

134. *See, e.g.*, 3D Sys. Corp., SEC No-Action Letter, 1999 WL 193422, at *1 (Apr. 6, 1999) (“[T]here appears to be some basis for your view that a portion of the proposal may be vague and indefinite. In our view, the term ‘value’ regarding the 5% increase in the value of 3D common stock should be defined. Accordingly, unless the proponent provides 3D with a proposal revised in this manner, within seven calendar days after receiving this letter, we will not recommend enforcement action to the Commission if 3D omits the proposal from its proxy materials in reliance on rule 14a-8(i)(3).”).

Similarly, revisions were permitted with respect to the use of external standards. In *Diamond Rock Corp.*,¹³⁵ for example, the shareholder proposal referred to the Sullivan Principles, standards applicable to companies with investments in South Africa. The company asserted that the standards generated “considerable uncertainty” and that, as a result of the reference, shareholders “could not possibly know precisely what they were being asked to approve.”¹³⁶ The proponent, however, received the right to add a summary of “the provisions of the Sullivan Principles” in the supporting statement.¹³⁷ Similarly, references to the “2003 NIS Social Rating of socially responsible mutual funds” could be included but only if clarified and summarized.¹³⁸

The elimination of the right to cure changed the approach. Terms or phrases identified as “vague and indefinite” generally resulted in exclusion without a right to revise.¹³⁹ Unexplained conflicts with another bylaw pro-

135. SEC No-Action Letter, 1986 WL 65223 (Feb. 6, 1986).

136. *See id.* at *3 (“Under the circumstances, the Company’s stockholders could not possibly know precisely what they were being asked to approve as a ‘request’ to the Company’s Board of Directors—and, if such a request were made by the stockholders, the Company could not know what it was being asked to agree to or to perform. For these reasons, the Company believes that the UMC statement quoted above is materially incomplete and, as a result, misleading within the meaning of Rule 14a-9.”).

137. *See id.* at *1 (“There appears to be some basis for your view that the proposal may be vague, and therefore misleading, in that it fails to delineate the provisions of the Sullivan Principles. However, it appears that this defect could be cured if the proposal were revised to describe or summarize the provisions of the Sullivan Principles. Assuming the proponent promptly amends the proposal in the manner indicated, we do not believe that the Company may rely on Rule 14a-8(c)(3) as a basis for omitting the proposal and supporting statement in their entirety from its proxy material.”).

138. *See* Coll. Ret. Equities Fund, SEC No-Action Letter, 2003 WL 23306671, at *1, 6 (Sept. 25, 2003) (proponent should “clarify what NIS is” and should “summarize how the NIS rating is determined”); *see also* Occidental Petroleum Corp., 2002 WL 523418, at *1 (Mar. 8, 2002) (concurring with the exclusion of a proposal requesting the implementation of a policy consistent with the “Voluntary Principles on Security and Human Rights,” where the proposal failed to adequately summarize the external standard despite referring to some, but not all, of the standard’s provisions).

139. *See, e.g.*, Microsoft Corp., SEC No-Action Letter, 2016 WL 5930441 (Oct. 7, 2016) (“There appears to be some basis for your view that Microsoft may exclude the proposal under rule 14a-8(i)(3), as vague and indefinite. We note in particular your view that, in applying this particular proposal to Microsoft, neither shareholders nor the company would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires.”); Amphenol Corp., SEC No-Action Letter, 2014 WL 1348940, at *4 (Mar. 28, 2014) (“Here, the Proposal is impermissibly vague and indefinite so as to be inherently misleading because, among other things, the Proposal is internally inconsistent and does not sufficiently explain when the requested policy would apply.”); Berkshire Hathaway Inc., SEC No-Action Letter, 2011 WL 6859125, at *1 (Jan. 31, 2012) (proposal requesting “that the CEO, other top officials and the Board of Directors be required to sign-off be[sic] means of an electronic key, daily or weekly, that they have observed and approve or disapprove of figures and policies that show a high risk condition for the company, caused by those policies” considered “vague and

vision resulted in a finding of vague and indefinite without the right to cure.¹⁴⁰ The exclusion applied to proposals relating to special meetings,¹⁴¹ the acceleration of unvested equity awards,¹⁴² compliance controls for violations, or the separation of chair and CEO.¹⁴³

indefinite” for “not sufficiently explain[ing] the meaning of ‘electronic key’ or ‘figures and policies’” without right to cure).

140. *See, e.g.*, Staples, Inc., SEC No-Action Letter, 2012 WL 364041, at *1 (Apr. 13, 2012) (“The proposal does not address the conflict between these two provisions of Staples’ bylaws.”); Wells Fargo & Co., SEC No-Action Letter, 2011 WL 6935318, at *1 (Mar. 7, 2012) (proposal seeking to amend bylaws to require inclusion in proxy materials of “certain disclosures and statements, of any person nominated for election to the board by a shareholder or group of shareholders who beneficially owned 1% or more” of company’s common stock considered “vague and indefinite” for failing to “address the conflict between” another provision in the bylaws with no right to cure).

141. *See, e.g.*, United Cont’l Holdings, Inc., SEC No-Action Letter, 2012 WL 380439, at *1 (Mar. 8, 2012) (describing proposal asking board “to take the steps necessary unilaterally (to the fullest extent permitted by law) to . . . enable one or more holders of not less than one-tenth of the company’s voting power (or the lowest percentage of outstanding common stock permitted by state law) to call a special meeting” considered vague and indefinite without right to cure); Yahoo! Inc., SEC No-Action Letter, 2012 WL 478081, at *1 (Mar. 8, 2012) (proposal asking board “to take the steps necessary unilaterally (to the fullest extent permitted by law) to . . . enable one or more holders of not less than one-tenth of the company’s voting power (or the lowest percentage of outstanding common stock permitted by state law) to call a special meeting” considered vague and indefinite without right to cure).

142. *See, e.g.*, Devon Energy Corp., SEC No-Action Letter, 2012 WL 160564, at *1 (Mar. 1, 2012) (proposal urging board to adopt policy “that in the event of a senior executive’s termination or a change of control, there shall be no acceleration in the vesting of any equity awards to senior executives, except that any unvested equity awards may vest on a pro rata basis. To the extent any such unvested equity awards are based on performance, the performance goals must be met” considered to be “vague and indefinite” without the right to cure); Ltd. Brands, Inc., SEC No-Action Letter, 2012 WL 249848, at *1 (Feb. 29, 2012) (proposal urging board to adopt policy “that in the event of a change of control, there shall be no acceleration in the vesting of any equity awards to senior executives, provided that any unvested award may vest on a pro rata basis up to the time of a change of control event” considered to be “vague and indefinite” with no right to cure); Verizon Commc’ns Inc., SEC No-Action Letter, 2011 WL 6837541, at *1 (Jan. 27, 2012) (proposal urging board to adopt policy “that in the event of a senior executive’s termination or a change-in-control, there shall be no acceleration in the vesting of any equity awards to senior executives, except that any unvested equity awards may vest on a pro rata basis that is proportionate to the executive’s length of employment during the vesting period” considered to be “vague and indefinite” with no right to cure).

143. *See, e.g.*, ConocoPhillips, SEC No-Action Letter, 2012 WL 122330, at *1 (Mar. 13, 2012) (proposal recommending that board “commission an audit of the compliance controls failing to prevent Foreign Corrupt Practices Act violations by the board chairman” could be omitted under subsection (i)(3) without right to cure).

B. “Four Corners” Analysis and the Expansion of “Vague and Indefinite”

1. *Four Corners*

The elimination of the right to cure after 2004 coincided with a change in the approach used to define proposals treated as vague.¹⁴⁴ Initially, the standard applied where the proposal made “it impossible for either the board of directors or the stockholders at large to comprehend precisely what the proposal would entail.”¹⁴⁵ “Reasonable certainty” eventually replaced impossibility, extending the exclusion to proposals that did not necessarily qualify as misleading.¹⁴⁶

The nexus to the antifraud provisions further weakened with the decision to determine vagueness on the basis of the four corners of the proposal and supporting statement.¹⁴⁷ The interpretation diverged from the traditional approach used under Rule 14a-9. In assessing the materiality of a statement, the antifraud provision looked to the “total mix” of available information. Total mix included matters appearing elsewhere in the proxy materials or otherwise commonly known to shareholders.¹⁴⁸ The

144. *See* *Dyer v. SEC*, 287 F.2d 773, 781 (8th Cir. 1961) (holding that the SEC did not act arbitrarily by requiring exclusion of a shareholder proposal). In fact, the proposal was submitted to shareholders the following year. *See id.* (“As a matter of fact, when petitioners repeated the request the following year, to have the proposal included in management’s proxy statement for that stockholders meeting, management decided to let this be done, presumably to enable it to get rid of the question; and the resolution was duly submitted and defeated.”).

145. *See id.* at 781.

146. *See* *E.I. du Pont de Nemours & Co.*, SEC No-Action Letter, Fed. Sec. L. Rep. ¶ 81,122, 1977 WL 11653, at *6 (Feb. 8, 1977); *see also* *Coca-Cola Co.*, SEC No-Action Letter, 1977 WL 11671, at *5 (Feb. 24, 1977) (finding “some basis” for the opinion that the proposal was “so inherently vague and indefinite that the shareholders voting upon the proposal would not be able” to determine with “any reasonable certainty exactly what action” would be taken “in the event the proposal were implemented”); *Xerox Corp.*, SEC No-Action Letter, 1977 WL 12825, at *7 (Mar. 10, 1977) (“the Division concurs in your view that the action requested by the proposal is so inherently vague and indefinite that the shareholders voting upon the proposal would not be able to determine with any reasonable certainty exactly what action or measures the Company would take in the event the proposal were implemented. Consequently, we believe that the proposal may be misleading, in that, any action ultimately taken by the Company upon the implementation of the proposal could be quite different from the type of action envisioned by the shareholders at the time their votes were cast.”).

147. *See* Div. of Corp. Fin., Shareholder Proposals, SEC Staff Legal Bulletin No. 14G (Oct. 16, 2012), <https://www.sec.gov/interp/legal/cfslb14g.htm> [<https://perma.cc/A8TK-NM53>] (“In evaluating whether a proposal may be excluded on this basis [vague and indefinite], we consider only the information contained in the proposal and supporting statement and determine whether, based on that information, shareholders and the company can determine what actions the proposal seeks.”).

148. *See* *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). The total mix did not include information in other reports filed with the Commission. Information in the annual report to shareholders, however, posed a closer question. *See, e.g.,* *United Paper Workers Int’l Union v. Int’l Paper Co.*, 985 F.2d 1190, 1200 (2d Cir. 1993) (“On the other hand, given the unqualifiedly glowing state-

interpretation of Rule 14a-8(i) (3), however, limited the analysis mostly to the language of the proposal and the supporting statement.

The shift meant that almost any proposal became subject to challenge as “vague and indefinite.” Given the word limit,¹⁴⁹ proposals and their supporting statements rarely had the space to thoroughly define all terms or completely summarize every standard.¹⁵⁰ Use of a well-known or easily available external standards saved space but also rendered the proposal subject to challenge.

References to a staff legal bulletin¹⁵¹ or the requirements of Rule 14a-8 resulted in exclusion, without a right to revise.¹⁵² So did reliance on external definitions of independent director. In one case, the no-action letter permitted exclusion where the proposal relied on a definition developed by the Council of Institutional Investors.¹⁵³

ments that were actually made in the Proxy Statement, we consider it a close question whether such disclosures made in the annual report should be deemed part of the total mix available to shareholders or should instead be deemed buried in a part of the report where one seeking environmental information might not think to look.”).

149. See 17 C.F.R. § 240.14a-8(d) (2017).

150. In one series, the no-action letter agreed that a reference to “nontrivial” amounts of stock was vague and indefinite, see Pfizer, Inc., SEC No-Action Letter, 2014 WL 7171636, at *4 (Mar. 10, 2015) (“There appears to be some basis for your view that Pfizer may exclude the proposal under rule 14a-8(i) (3), as vague and indefinite. We note in particular your view that, in applying this particular proposal to Pfizer, neither shareholders nor the company would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires.”). *But see* McGraw Hill Fin., Inc., SEC No-Action Letter, 2015 WL 412926, at *1 (Feb. 26, 2015) (“Although the staff has previously agreed that there is some basis for your view, upon further reflection, we are unable to conclude that the proposal, taken as a whole, is so vague or indefinite that it is rendered materially misleading.”).

151. See, e.g., Gen. Elec. Co., SEC No-Action Letter, 2014 WL 6999590, at *1, 15 (Jan. 15, 2015) (proposal requesting that the board “establish a rule” that separated the chair and CEO, the supporting statement noted that “[t]his proposal gives our company an opportunity to follow SEC Staff Legal Bulletin 14C to cure a Chairman’s non-independence” (internal quotations omitted)).

152. See, e.g., Dell, Inc., SEC No-Action Letter, 2012 WL 1615814, at *1 (Mar. 30, 2012) (standard of “SEC Rule 14a-8(b) eligibility requirements” considered vague and indefinite (internal quotations omitted)). As the no-action letter noted: “While we recognize that some shareholders voting on the proposal may be familiar with the eligibility requirements of rule 14a-8(b), many other shareholders may not be familiar with the requirements and would not be able to determine the requirements based on the language of the proposal.” *Id.*

153. See, e.g., Honeywell Int’l Inc., SEC No-Action Letter, 2009 WL 851469, at *1 (Feb. 3, 2009) (proposal excluded where proposal “provide[d] that the standard of independence would be the standard set by the Council of Institutional Investors which is simply an independent director is a person whose directorship constitutes his or her only connection to the corporation”); Boeing Co., SEC No-Action Letter, 2004 WL 315205, at *1 (Feb. 10, 2004) (“The proposal requests that Boeing amend its bylaws to require that an independent director, as defined by the Council of Institutional Investors, shall serve as chairman of the board of directors. There appears to be some basis for your view that Boeing may exclude the proposal under rule 14a-8(i) (3) as vague and indefinite . . .”).

In *Chevron Corp.*,¹⁵⁴ the issuer succeeded in obtaining exclusion of a proposal that referenced the definition of independent director that appeared in the listing standards of the New York Stock Exchange (NYSE). Shareholders submitted a proposal calling for the separation of chair and CEO. The chair was to be an “independent director according to the definition set forth in the New York stock exchange standards.”¹⁵⁵ The definition used by the NYSE consisted of around 1300 words, far in excess of the limit for proposals under in Rule 14a-8.¹⁵⁶

The reference to the NYSE standard rendered the proposal “vague and indefinite.” As the no-action letter explained:

[W]e note that the proposal refers to the “New York Stock Exchange listing standards” for the definition of an “independent director,” but does not provide information about what this definition means. In our view, this definition is a central aspect of the proposal. As we indicated in Staff Legal Bulletin No. 14G (Oct. 16, 2012), we believe that a proposal would be subject to exclusion under rule 14a-8(i)(3) if neither the shareholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with reasonable certainty exactly what actions or measures the proposal requires. In evaluating whether a proposal may be excluded on this basis, we consider only the information contained in the proposal and supporting statement and determine whether, based on that information, shareholders and the company can determine what actions the proposal seeks.¹⁵⁷

154. SEC No-Action Letter, 2013 WL 207026 (Mar. 15, 2013).

155. *Id.* at *14. The resolution provided that:

[S]hareholders of Chevron . . . ask the Board of Directors to adopt a policy that the Board’s Chair be an independent director according to the definition set forth in the New York Stock Exchange standards, unless Chevron common stock ceases being listed there and is listed on another exchange, at which point, that exchange’s standards should apply.

Id. The shareholder submitted a revised version providing that “shareholders of Chevron . . . ask the Board of Directors to adopt a policy that the Board’s Chair be an independent director (*by the standard of the New York Stock Exchange*), who has not previously served as an executive officer of the Company.” *Id.* at *7 (emphasis in original). The no-action letter apparently considered only the first version.

156. The NYSE definition consists of around 1300 words. *See* N.Y.S.E. LISTED CO. MANUAL § 303A.02, 2003 WL 2373121 (2013).

157. *Chevron Corp.*, 2013 WL 207026, at *1. The Commission had excluded a number of similar proposals the prior year without specifying the reason. *See, e.g.*, Clorox Co., SEC No-Action Letter, 2012 WL 2867781, at *2 (Aug. 13, 2012) (proposal “provid[ing] that the chairman shall be a director who is independent from the company, as defined in the New York Stock Exchange listing standards” considered “vague and indefinite” without right to cure); WellPoint, Inc., SEC No-Action Letter, 2012 WL 167230, at *1 (Feb. 24, 2012) (proposal requesting “that the board adopt a policy that the chairman shall be an independent director according to the definition set forth in the New York Stock Exchange listing standards” considered “vague and indefinite” without right to cure); Mattel, Inc., SEC No-

In addition to sidestepping the widespread nature of the standard, the position failed to take into account the discussion in the standard elsewhere in the company's proxy materials. Because the issuer traded on that exchange, the proxy statement repeatedly referenced the definition used by the NYSE.¹⁵⁸ The approach likewise declined to take into account explanatory comments in management's opposition statement.¹⁵⁹ Nor was the standard apparently applied to disclosure by the issuer in the same proxy statement.¹⁶⁰

Action Letter, 2011 WL 6837543, at *1 (Feb. 9, 2012) ("proposal request[ing] that the board adopt a policy that, whenever possible, the chairman shall be an independent director, by the standard of the New York Stock Exchange, who has not previously served as an executive officer of Mattel" considered "vague and indefinite" without right to cure).

158. As the Chevron proxy statement noted, "[t]he Board has determined that each nonemployee Director who served in 2012 and each current nonemployee Director is independent in accordance with the NYSE Corporate Governance Standards and that no material relationship exists that would interfere with the exercise of independent judgment in carrying out the responsibilities of a Director." CHEVRON CORP., 2013 PROXY STATEMENT 11, 16, 24, 28 (2012), https://www.sec.gov/Archives/edgar/data/93410/000130817913000196/lchevron_def14a.htm [<https://perma.cc/MP8A-ZT6M>]. The proxy statement noted that directors were required to be independent in accordance with the NYSE Corporate Governance Standards. *See id.* at 11. ("and that no material relationship exists that would interfere with the exercise of independent judgment"). Rather than explain the test, the proxy statement simply noted that "the Board adheres to the specific tests for independence included in the NYSE Corporate Governance Standards." *Id.*; *see also id.* at 21 ("The Committee is composed entirely of independent Directors as defined by the NYSE Corporate Governance Standards and operates under a written charter."). The proxy statement had not yet been filed when the no action request was considered. Nonetheless, the prior year's statement included references to the independence standard employed by the NYSE and could reasonably be expected to repeat the discussion. *See* CHEVRON CORP., 2012 PROXY STATEMENT 8 (2013), <https://www.sec.gov/Archives/edgar/data/93410/000119312512160701/d304761ddef14a.htm> [<https://perma.cc/UZ6J-PN6E>].

159. The statement provided an opportunity to address unclear or allegedly incorrect statements. *See* Int'l Tel. & Tel. Corp., SEC No-Action Letter, 1983 WL 30878, at *2 (Mar. 7, 1983) ("[T]his Division does not concur that the proposal is false and misleading in violation of Rule 14a-8(c)(3) because shareholders will be confused regarding the date fixed for the 1983 meeting. If management continues to believe that such confusion will result, it could, in our view, clarify this point in its own statement in opposition."); *see also* NLT Corp., SEC No-Action Letter, 1982 WL 28881, at *2 (Feb. 16, 1982) ("With respect to the applicability of Rule 14a-8(c)(3) to the proposal and the balance of the supporting statement, this Division is unable to concur in counsel's opinion that the proposal omits to state material facts or that the supporting statement is otherwise misleading. In the event that management continues to believe that the proposal and supporting statement is confusing and raise improper implications, it could, in our view, effectively eliminate them in its own statement on the proposal."). Management must share the opposition statement with the proponent prior to the distribution of proxy materials. *See* 17 C.F.R. § 240.14a-8(m)(3) (2017).

160. Shareholders were allowed to object to false and misleading information in the opposition statement used by the issuer. *See* 17 C.F.R. § 240.14a-8(m)(2). The provision, however, has essentially been unenforced. *See, e.g.,* Hinz, *supra* note 6, at 223. Subsequent no-action letters apparently took the opposite view, allowing

2. *Hyperlinks Foreclosed*

Hyperlinks represented a possible solution.¹⁶¹ Shareholders could include URLs in their proposals that linked to appropriate definitions. Nonetheless, the approach was also foreclosed. Content on the Internet could be used to exclude¹⁶² but not augment¹⁶³ a proposal.

The ban on the use of hyperlinks to supply missing definitions stood in contrast to the increased expectation that investors would access materials electronically. Proxy statements¹⁶⁴ and annual reports were increas-

the inclusion of a proposal that referenced the NYSE standards for independence. *See* Sears Holding Corp., SEC No-Action Letter, 2017 WL 6629373, at *1 (Feb. 9, 2018) (finding that proposal calling for board chair to be held by an independent director “as defined in accordance with applicable requirements of the NYSE” was not “so vague or indefinite that it is rendered materially misleading”).

161. *See* SEC Staff Legal Bulletin No. 14, *supra* note 15, at 14 (“Because we count a website address as one word for purposes of the 500-word limitation, we do not believe that a website address raises the concern that rule 14a-8(d) is intended to address.”); *see also* McKesson Corp., SEC No-Action Letter, 2013 WL 2407163, at *27 (May 31, 2013) (“[W]e believe that a proposal would be subject to exclusion under rule 14a-8(i)(3) if neither the shareholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with reasonable certainty exactly what actions or measures the proposal requires. In evaluating whether a proposal may be excluded on this basis, we consider only the information contained in the proposal and supporting statement and determine whether, based on that information, shareholders and the company can determine what actions the proposal *seeks*.” (emphasis added)).

162. *See* SEC Staff Legal Bulletin No. 14, *supra* note 15, at 22 (“In some circumstances, we may concur in a company’s view that it may exclude a website address under rule 14a-8(i)(3) because information contained on the website may be materially false or misleading, irrelevant to the subject matter of the proposal or otherwise in contravention of the proxy rules. Companies seeking to exclude a website address under rule 14a-8(i)(3) should specifically indicate why they believe information contained on the particular website is materially false or misleading, irrelevant to the subject matter of the proposal or otherwise in contravention of the proxy rules.”); *see also* SEC Staff Legal Bulletin No. 14G, *supra* note 145 (“To the extent that the company seeks the exclusion of a website reference in a proposal, but not the proposal itself, we will continue to follow the guidance stated in SLB No. 14, which provides that references to website addresses in proposals or supporting statements could be subject to exclusion under Rule 14a-8(i)(3) if the information contained on the website is materially false or misleading, irrelevant to the subject matter of the proposal or otherwise in contravention of the proxy rules, including Rule 14a-9.”).

163. *See* SEC Staff Legal Bulletin No. 14G, *supra* note 147 (“If a proposal or supporting statement refers to a website that provides information necessary for shareholders and the company to understand with reasonable certainty exactly what actions or measures the proposal requires, and such information is not also contained in the proposal or in the supporting statement, then we believe the proposal would raise concerns under Rule 14a-9 and would be subject to exclusion under Rule 14a-8(i)(3) as vague and indefinite.”).

164. *See* 17 C.F.R. § 240.14a-16 (2017). Shareholders can still request hard copies and companies can opt to mail hard copies. Nonetheless, the use of hard copies has continued to decline. *See, e.g.*, BROADRIDGE & PWC, PROXYPULSE: 2017 PROXY SEASON PREVIEW 4 (2017), http://proxypulse.broadridge.com/proxypulse/_assets/docs/broadridge-2017-proxy-season-preview.pdf [<https://perma.cc/4MJZ-ZCG2>] (“For the first time, over 50% of retail investors chose to receive their proxy

ingly online.¹⁶⁵ The Commission required the inclusion of links in SEC filings to exhibits.¹⁶⁶ With respect to social media, the Commission has permitted hyperlinks to be used in place of required legends, presuming that investors would have access to the Internet.¹⁶⁷ Proposed rule changes would allow the use of hyperlinks in SEC filings to other documents filed in EDGAR.¹⁶⁸

Moreover, issuers commonly included hyperlinks in proxy statements. The Chevron proxy statement at issue in the no-action letter concerning independent directors provided for links to the ethics code¹⁶⁹ and policies regarding social responsibility.¹⁷⁰ A URL appeared in the opposition

materials electronically during this mini-season—a 9 percentage point increase over the same period last year.”).

165. See *Division of Corporate Finance Guidance: Proxy Rules and Schedule 14A (Regarding Submission of Annual Reports to SEC Under Rules 14a-3(c) and 14c-3(b))*, U.S. SEC. & EXCH. COMM’N (Nov. 2, 2016), <https://www.sec.gov/divisions/corpfin/guidance/exchange-act-rule-14a3-14c3.htm> [<https://perma.cc/S4HC-DGE5>] (“The Division will not object if a company posts an electronic version of its annual report to its corporate web site by the dates specified in Rule 14a-3(c), Rule 14c-3(b) and Form 10-K respectively, in lieu of mailing paper copies or submitting it on EDGAR. If the report remains accessible for at least one year after posting, the staff will consider it available for its information.”).

166. See Exhibit Hyperlinks and HTML Format, Exchange Act Release No. 10322, 2017 WL 839489, at *1 (Mar. 1, 2017) (noting that proposals “were intended to facilitate easier access to these exhibits for investors and other users of the information”).

167. See *Securities Act Rules: Compliance and Disclosure Interpretations*, SEC. & EXCH. COMM’N (Nov. 6, 2017), <https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm> [<https://perma.cc/6Q33-M6PH>]; see also Exemptions to Facilitate Intrastate and Regional Securities Offerings, Exchange Act Release No. 10238, 2016 WL 6872611, at *9 (Oct. 26, 2016) (“To accommodate space-constrained social media communication, when offering materials are distributed through a communications medium that has technological limitations on the number of characters or amount of text that may be included in the communication and including the required statements in their entirety, together with the other information, would cause the communication to exceed the limit on the number of characters or amount of text, an issuer could satisfy the disclosure requirement by including an active hyperlink to the required disclosure that otherwise would be required by the rules.”).

168. See Fast Act Modernization and Simplification of Regulation S-K, Exchange Act Release No. 81851, 2017 WL 4548274, at *89 (Oct. 11, 2017) (“Consistent with the recommendation of commenters and the staff, we are proposing to facilitate greater investor access to disclosure by amending Rule 411, Rule 12b-23, and Rule 0-4 to require hyperlinks to information that is incorporated by reference if that information is available on EDGAR.”).

169. See CHEVRON CORP., 2013 PROXY STATEMENT, *supra* note 158, at 20 (“We have adopted a code of business conduct and ethics for Directors, officers (including the Company’s Chief Executive Officer, Chief Financial Officer and Comptroller) and employees, known as the Business Conduct and Ethics Code. The code is available on our website at www.chevron.com and is available in print upon request.”).

170. See *id.* at 70 (“Many of the issues included in the following stockholder proposals are discussed in Chevron’s Corporate Responsibility Report, our Annual Report and this Proxy Statement. Additional information on Chevron’s corporate

statement.¹⁷¹ The proxy statement contained more than twenty references to material located at the company's website.¹⁷²

3. *Consequences*

The approach in some ways favored proposals without references to external standards or definitions. In *Comcast Corp.*,¹⁷³ the shareholder submitted a proposal requesting "that the board adopt a policy . . . to require" that the chair "be an independent" director.¹⁷⁴ The company objected, noting that the proposal "fail[ed] to provide any definition for that critical concept."¹⁷⁵ The staff, however, was "unable to conclude" that the proposal was "so inherently vague or indefinite" and therefore subject to exclusion.¹⁷⁶ Thus, a proposal that referred to a specific and widely known standard (the NYSE definition of independence) was considered vague while one that referenced no standard at all was considered sufficiently concrete.

C. *Images*

As the 2004 staff bulletin noted, the exclusion also extended to proposals with language deemed "irrelevant." Despite the goal of narrowing the application of subsection (i)(3), the concept of irrelevancy expanded over time to address the use of tables and images. The standard was, however, used to edit proposals rather than exclude them entirely.

Graphs, charts, and tables in proxy statements generally benefited investors¹⁷⁷ and their inclusion had been encouraged.¹⁷⁸ Nonetheless, Rule

governance and corporate social responsibility philosophies and initiatives is available on our website at www.chevron.com.").

171. See *id.* at 71 ("Some of this year's stockholder proposals refer to the Ecuador litigation involving the Company. . . . Chevron has provided substantial information on these matters in our required and voluntary disclosures, including Chevron's quarterly and annual SEC reports and on our website. At www.chevron.com/ecuador, stockholders and the public can find background materials, press releases, media articles, legal filings, scientific reports, videos and other information. We encourage all stockholders to familiarize themselves with these materials."); see also *id.* at 73, 74–75, 79, 81, 82, 85, 87, 89 (featuring other URL links).

172. The proxy statement included twenty-four references that contained the stem, "www.chevron.com." See *id.*

173. SEC No-Action Letter, 2016 WL 521265 (Feb. 8, 2016).

174. See *id.* at *1.

175. See *id.* at *5.

176. See *id.* at *1.

177. See, e.g., U.S. SEC. & EXCH. COMM'N, STUDY REGARDING FINANCIAL LITERACY AMONG INVESTORS iv (Aug. 2012), <https://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf> [<https://perma.cc/GG4U-ZG7N>] ("With respect to the format of disclosure documents, investors prefer that disclosures be written in clear, concise, understandable language, using bullet points, tables, charts, and/or graphs.").

178. Encouragement to use tables and other visual aids was not limited to the proxy process. See Commission Guidance Regarding Management's Discussion

14a-8 did not specifically address the right of shareholders to add non-textual materials such as pictures and tables to their proposals. Such additions could take up additional space in the proxy statement. Moreover, efforts by issuers to reduce the size of the images could interfere with the obligation to ensure that matters were “clearly presented”¹⁷⁹ or printed in at least 10-point type.¹⁸⁰

Traditionally, the word limit in the rule represented the primary source of regulation for this type of content. In *Ferrofluidics Corp.*,¹⁸¹ an executive compensation proposal included a graph. The company sought exclusion, arguing that, based upon the amount of space, the proposal exceeded the equivalent of 500 words. The no-action letter declined to accept the position,¹⁸² noting that the rule “only impose[d] a limitation on the number of words, and provide[d] no basis for equating graphic presentations to words.”¹⁸³ The words and numbers used in the chart, however, counted against the word limit.¹⁸⁴

The approach left a number of issues unaddressed. In particular, pictures and other images took up space but did not necessarily implicate the

and Analysis of Financial Condition and Results of Operations, Exchange Act Release No. 8350, 2003 WL 22996757, at *6 (Dec. 19, 2003) (“Companies should consider whether a tabular presentation of relevant financial or other information may help a reader’s understanding of MD&A. For example, a company’s MD&A might be clearer and more concise if it provides a tabular comparison of its results in different periods, which could include line items and percentage changes as well as other information determined by a company to be useful, followed by a narrative discussion and analysis of known changes, events, trends, uncertainties and other matters.”).

179. See 17 C.F.R. § 240.14a-5(a) (2017).

180. Only footnotes can use smaller type. See *id.* § 240.14a-5(d)(1) (“All printed proxy statements shall be in roman type at least as large and as legible as 10-point modern type, except that to the extent necessary for convenient presentation financial statements and other tabular data, but not the notes thereto, may be in roman type at least as large and as legible as 8-point modern type. All such type shall be leaded at least 2 points.”); see also Part 230—General Rules and Regulations, Securities Act of 1933 Part 240—General Rules and Regulations, Securities Exchange Act of 1933, Exchange Act Release No. 9151, 1971 WL 126067, at *1 (Apr. 30, 1971) (“The amendments provide that notes to financial statements and other tabular data shall be set forth in 10-point type, which is the size of type prescribed for the body of prospectuses, proxy statements and other documents filed with the Commission or sent to security holders.”).

181. SEC No-Action Letter, 1992 WL 235093 (Sept. 18, 1992).

182. See *id.* at *2 (“The Proposal may also violate Rule 14a-8(b)(1) in that it contains a graph which in size, when combined with the text of the Proposal and Supporting Statement, appears to exceed the 500-word limit contained in that Rule.”).

183. *Id.* at *1.

184. See also *Aetna Life & Cas. Co.*, SEC No-Action Letter, 1995 WL 18740, at *1 (Jan. 18, 1995) (proposal exceeded 500 words and could be excluded where it included a table that, if each numerical entry in the table were counted as a word, the total would exceed 500); *Am. Express Co.*, SEC No-Action Letter, 1995 WL 18745, at *6 (Jan. 18, 1995) (exclusion permitted for exceeding 500 words where company argued that by, “[i]ncluding the numbers in these graphs as one word each, the proposal contains over 650 words”).

word count. A no-action letter to General Electric, however, extended subsection (i)(3) to these materials.

The proposal addressed cumulative voting. The supporting statement asserted that the authority “may serve to better align shareholder performance to CEO performance” and referenced an “image.”¹⁸⁵ The image contained a series of charts titled “Debt/Earnings (DE) Study: GE, JNJ, AAPL” and stating that “Debt Driven Volatility Hurts Shareholders, yet Enriches the CEO who ‘wisely’ trades.”¹⁸⁶ The charts included emojis consisting of smiling or frowning faces.

The no-action letter issued by the Commission initially declined to permit omission, finding that the presence of the images did not cause the proposal to exceed 500 words.¹⁸⁷ The company sought Commission review,¹⁸⁸ emphasizing the complexity of the issue.

The issues presented by the prospect of including images within shareowner proposals submitted under Rule 14a-8 are novel and highly complex. The most fundamental issue—how to reconcile a “500 word” limitation with the use of an image—itself is novel. Moreover, the use of images within shareowner proposals raises complex issues such as whether a shareowner can force a company to incur the expense of printing the image in color if such is necessary for the image to be understandable, how to resolve potential copyright or privacy claims over use of an image, and how to assess whether an image is false or misleading.¹⁸⁹

A footnote also asserted that the images had no clear relationship with the proposal and were therefore misleading.¹⁹⁰

185. See Gen. Elec. Co., SEC No-Action Letter, 2016 WL 7370133, at *4 (Feb. 3, 2017).

186. The graph can be found at page 52 of the original no-action request. See Gen. Elec., SEC No-Action Letter, at 52 (Feb. 3, 2017), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/martinharangozo020317-14a8.pdf> [<https://perma.cc/5G6M-8MPL>].

187. See Gen. Elec., 2016 WL 7370133, at *22.

188. Although the response noted that requests for Commission review could be presented for “matters of substantial importance and where the issues are novel or highly complex,” the issue apparently did not meet that standard. See Gen. Elec., SEC No-Action Letter, 2017 WL 821664, at *1 (Feb. 23, 2017); see also 17 C.F.R. § 202.1(d) (2017). The response came an associate director of the division. See Gen. Elec., 2017 WL 821664, at *1 (letter from staff signed by Associate Director, Legal).

189. *Id.* at *6.

190. See *id.* at *9 n.9 (“In addition to the Images being vague and misleading when presented in the formatted equivalent space of 500 words, the Images also are misleading because they have no clear relationship to the subject matter of the Proposal. Therefore, we respectfully believe that the Proposal also is properly excludable pursuant to Rule 14a-8(i)(3).”).

The Commission did not review the matter but the staff reconsidered and permitted exclusion.¹⁹¹ Describing the visual as “a page of images, including detailed charts, graphs, equations, and emoji,” the no-action letter characterized the challenged material as “irrelevant,” resulting in “a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which he or she is being asked to vote.”¹⁹²

Although relying on subsection (i)(3), the table arguably did not qualify as false and misleading. The 2004 bulletin allowed for exclusion on the basis of irrelevancy but only where the material encompassed a “substantial portion[] of the supporting statement” and created a “strong likelihood that a reasonable shareholder would be uncertain as to the matter on which she is being asked to vote.”¹⁹³ The image at issue in the *General Electric* letter did not appear to implicate either issue.

The use of a single no-action letter to exclude tables raised the specter of another encrypted interpretation.¹⁹⁴ Neither the letter in *General Electric* nor a subsequent staff bulletin provided any significant guidance on the use of irrelevancy to regulate tables, charts and images. Only through application would the full extent of the interpretation become known.

V. ADDRESSING THE USE OF ENCRYPTED INTERPRETATIONS

An understanding of Rule 14a-8 requires resort to a significant body of administrative interpretations. The no-action letter process and the role of the staff as “informal arbiters” of disputes between issuers and proponents constitute a widely accepted approach.¹⁹⁵ Efforts to significantly

191. See *id.* at *9. The company did argue that a reduction in the size of the images could render them “so small that they [would] not be meaningful, and in fact could be misleading.” See *id.* The company did not, however, assert that they were irrelevant and therefore misleading. See *id.*

192. *Id.* at *1, 4 (“Although we are unable to concur in your view that the proposal as a whole may be excluded, there appears to be some basis for your view that GE may exclude the Images (as defined in your February 13, 2017 letter) under rule 14a-8(i)(3). In our view, the Images are irrelevant to a consideration of the subject matter of the proposal, such that there is a strong likelihood that a reasonable shareholder would be uncertain as to the matter on which he or she is being asked to vote. Accordingly, we will not recommend enforcement action to the Commission if GE omits the Images from its proxy materials in reliance on rule 14a-8(i)(3).”).

193. See SEC Staff Legal Bulletin No. 14B, *supra* note 17.

194. Subsequent no-action letters suggest that the “irrelevancy” prong of subsection (i)(3) become a tool used to edit proposals, suggesting a return to the approach used prior to the 2004 Bulletin. See Kroger Co., SEC No-Action Letter, 2017 WL 697559, at *1 (Mar. 27, 2017) (authorizing company to omit portion of proposal relating to neonics as “irrelevant”).

195. See Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 39093, 1997 WL 578696, at *4 (Sept. 18, 1997) (noting that the Commission and staff play “the role of informal arbiter between companies and shareholders submitting a growing variety of shareholder proposals”); see also A. A. Sommer, Jr., Morgan, Lewis & Bockius, Washington, D.C., Delivered in Lisbon,

reduce or eliminate this role has, at least historically, been opposed.¹⁹⁶ As a result, no-action letters interpreting the requirements of Rule 14a-8 will remain an established part of the process.

Administrative interpretations are typically developed in a non-transparent fashion through a process that does not necessarily involve input from interested parties.¹⁹⁷ Moreover, shifts in viewpoint can be abrupt.¹⁹⁸ The lack of input can result in an approach inconsistent with the language or intent of the rule.¹⁹⁹

In addition, articulation of these interpretations in an encrypted fashion adds uncertainty to the shareholder proposal process. With administrative positions disclosed only through application, their boundaries will often remain unclear. Proponents cannot fully take them into account when drafting proposals. Issuers may have an incentive to probe the boundaries of the position through the no-action process.

The lack of transparency also makes challenges to administrative positions more difficult. Parties can appeal rulings in no-action letters.²⁰⁰ Appeals, however, are generally limited to “matters of substantial importance” or those involving issues deemed “novel or highly com-

Portugal: The Regulation of Securities Markets in the United States 13 (May 1983), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1980/1983_0501_Sommer_Reg_US.pdf [https://perma.cc/9ZDV-LKRF] (“As you may well guess, there is frequently controversy between proponents and issuers about these matters, and again the Commission acts as an informal arbiter.”).

196. See, e.g., Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 23200, 1998 WL 254809, at *5 (May 21, 1998).

197. In one anomalous situation, the Commission sought comment before altering an administrative interpretation under Rule 14a-8. This occurred in connection with the interpretation of the exclusion in subsection (i)(9) for substantially identical proposals. See 17 C.F.R. § 240.14a-8(i)(9) (2017). For a discussion of the circumstances, see generally Brown, *Evolving Role*, *supra* note 9.

198. Viewpoints can shift with changes in leadership at the Commission. See generally J. Robert Brown, Jr., *Essay: The Politicization of Corporate Governance: Bureaucratic Discretion, the SEC, and Shareholder Ratification of Auditors*, 2 HARV. BUS. L. REV. 501 (2012) [hereinafter Brown, *The Politicization of Corporate Governance*].

199. An example of this occurred in connection with the interpretation of the exclusion applicable to proposals that have been substantially implemented. See 17 C.F.R. § 240.14a-8(i)(10). In two letters applicable to special meeting proposals, an interpretation was applied that was arguably inconsistent with the rule and, at a minimum, did not comport with the obligation of the issuer to justify the use of the exclusion. See generally J. Robert Brown, Jr., *Comment Letter on Rule 14a-8(I)(10)*, Securities & Exchange Commission (U. Denv. Legal Studies Res. Paper No. 15-26, June 18, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620417 [https://perma.cc/C764-HK6W]. Similarly, the 2004 bulletin essentially confessed fault when altering the interpretation of false and misleading under subsection (i)(3). See *supra* note 108.

200. For a discussion of the appeal and reconsideration process, see generally Courtney E. Bartkus, *Appealing No-Action Responses Under Rule 14a-8: Informal Procedures of the SEC and the Availability of Meaningful Review*, 93 DENV. L. REV. ONLINE 199 (2016).

plex.”²⁰¹ Encryption may make it more difficult for parties appealing a ruling to show the full extent of the administrative position and establish the requisite complexity.

Encryption has also, over time, become a more established part of the shareholder proposal process. No-action letters in the 1970s and 1980s often explained in detail the reasons for applying a particular exclusion or limitation. By the new millennium, the letters did little more than agree or disagree with one of the parties, making a precise understanding of the administrative position difficult to discern.

The reduction in analysis appears not to have been a result of work load. The number of no-action requests have declined since the 1980s.²⁰² In addition, letters raising novel issues or seeking a modification of existing positions presumably require an internal analysis to determine the outcome.²⁰³ Thus, the administrative cost of developing a position should largely be the same. The letters therefore could reflect a policy decision not to reveal internal analysis.

Accompanying the reduction in analysis has been a decline in direct involvement by the Commission. In earlier periods, Commission oversight took place on a regular basis. At least into the 1960s, the Commission routinely reviewed and voted upon interpretations set out in no-action letters under Rule 14a-8.²⁰⁴ In the 1970s and 1980s, administrative interpretations were regularly submitted to the public for comment.

In later decades, however, this type of involvement largely ceased. The instances where administrative interpretations have been articulated by the Commission and submitted for comment have declined. The rule was rewritten in plain English in 1998 but for the most part not changed

201. Appeals are permitted upon recommendation by the staff for issues deemed “complex” and “novel.” See 17 C.F.R. § 202.1(d).

202. In 2016, companies submitted 245 no-action requests (down from 318 in 2015). See Elizabeth Ising et al., *Shareholder Proposal Developments During the 2016 Proxy Season*, GIBSON DUNN 12 (June 28, 2016), <http://www.gibsondunn.com/publications/Documents/Shareholder-Proposal-Developments-2016-Proxy-Season.pdf> [https://perma.cc/8NUE-LKVB]; see also *Shareholder Proposal Developments During the 2017 Proxy Season*, GIBSON DUNN 12 (June 29, 2017), <https://www.gibsondunn.com/shareholder-proposal-developments-during-the-2017-proxy-season/> [https://perma.cc/R8BN-BCXU] (noting that 288 no-action requests submitted during 2017 proxy season). In 1983, companies filed 495 requests. See Memorandum from Bill Morley, *supra* note 81, at 2 (noting 414 contested proposals in 1983, with 328 letters issued by the Division and 495 contested proposals in 1982, with 315 letters issued by the Division).

203. See Lemke, *supra* note 10, at 1029 (“In many cases the staff attorney will meet with his supervisor to discuss the recommended response. A proposed response that involves a novel or significant issue may be reviewed on several levels within the division or by the Commission itself before the response is issued.”).

204. See, e.g., Div. of Corp Fin., Summary of Interpretations, 1960–1964, http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1960_1964_Interprt_Corp_Finance.pdf [https://perma.cc/G2ZR-EQWR] (describing Commission action on no-action letters).

substantively.²⁰⁵ Amendments adopted in 2010 altered one exclusion but otherwise left the rule intact.²⁰⁶ As a result, changes in the reach and meaning of the rule have mostly been left to the informal process set out in no-action letters.²⁰⁷

The lack of transparent intervention does not mean that the positions are inconsistent with Commission views or that the Commission has been uninvolved in determining the boundaries of these interpretations.²⁰⁸ The Commission has the authority to overturn administrative determinations. That this does not occur with any regularity suggests that in fact these views may already reflect the positions of at least a majority of the Commission.²⁰⁹

The approach, therefore, lacks sufficient transparency and accountability. Administrative positions are harder to attribute to the Commission and more difficult to challenge, both administratively and legally.²¹⁰ Rep-

205. See Brown, *Evolving Role*, *supra* note 9, at 152.

206. For a discussion of the amendment, see, e.g., Nicole L. Jones, *Shareholder Proposals, Director Elections, and Proxy Access: The History of the SEC's Impediments to Shareholder Franchise*, 93 DENV. L. REV. ONLINE 233, 237 (2016).

207. Thus, during the 2016 proxy season (defined as from Oct. 1, 2015 through June 1, 2016), shareholders of Russell 3000 companies submitted 916 proposals, down from 943 the year before. See Ising et al., *supra* note 202, at 4. Of that number, issuers submitted 245 requests for no-action relief, with 239 receiving a response. See *id.* at 12; see also Paul S. Atkins, Comm'r, Sec. & Exch. Comm'n, before the U.S. Chamber of Commerce, Shareholder Rights, the 2008 Proxy Season, and the Impact of Shareholder Activism (July 22, 2008), <https://www.sec.gov/news/speech/2008/spch072208psa.htm> [<https://perma.cc/8PMZ-98CY>] ("During the 2007–2008 proxy season, our staff was incredibly busy. We have received 426 no-action requests through July 15, an increase from the 367 received during the prior year. Of this number, 53 were withdrawn before the staff could respond. Unsurprisingly, the staff agreed with the company approximately 75.7% of the time.").

208. The reduction in Commission intervention in the form of rule amendments may in part be structural. Rule amendments involve delay and can be easily challenged, particularly as arbitrary and capricious. The courts have sometimes applied a very broad interpretation of this standard in invalidating Commission rules. See, e.g., *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1149 (D.C. Cir. 2011). For a discussion of the case, see generally J. Robert Brown, Jr., *Shareholder Access and Uneconomic Economic Analysis: Business Roundtable v. SEC*, 88 DENV. L. REV. ONLINE (2011), <http://www.denverlawreview.org/dlr-onlinearticle/2011/9/30/shareholder-access-and-uneconomic-economic-analysis-business.html> [<https://perma.cc/X9JZ-JWNS>].

209. Given the increasingly political division of the Commission, the administrative positions more likely reflect the views of the chair of the Commission. See Brown, *The Politicization of Corporate Governance*, *supra* note 198, at 503. The chair controls the agenda of meetings and, to the extent the chair seeks to overturn administrative interpretation, the chair could raise a matter at any time. To the extent that other commissioners want to bring a matter to the full Commission over a refusal by the chair to do so, they would presumably need a majority of the commissioners in office to do so. See *id.* at 530 n.169.

210. Where review has occurred, courts have sometimes characterized the position as a "rule." Nonetheless, to the extent deemed interpretive, the rule does not require notice and comment. See, e.g., *N.Y.C. Emps.' Ret. Sys. v. SEC*, 45 F.3d 7, 12 (2d Cir. 1995) ("Under this sweeping definition, the *Cracker Barrel* no-action

resenting “informal” positions,²¹¹ no-action letters are not generally treated as final agency actions subject to review.²¹² The lack of formal Commission involvement could, in theory, reduce the degree of deference given by courts to positions taken in no action letters. As a practical matter, however, this has not occurred.²¹³ The courts have in fact consistently deferred to positions taken in no action letters,²¹⁴ treating “longstanding”²¹⁵ positions as “persuasive.”²¹⁶

letter’s statement that the SEC would no longer follow the ‘significant policy implications’ exception was a rule: it stated generally that the Division staff was making a sea change and that it was abandoning its former policy regarding proxy inclusion requirements.”). Nor is the interpretative rule susceptible to challenge as arbitrary and capricious. *See id.* at 14 (“Here, the plaintiffs have an effective alternative to suing the SEC: They can sue Cracker Barrel, or any other offending company under Rule 14a-8, to enjoin the board to include their proposal in the proxy materials. In that suit, should the company offer the rule espoused in the *Cracker Barrel* no-action letter to show compliance, the plaintiffs may counter that the rule is arbitrary and capricious. If the plaintiffs prevail in that suit, they would then get all the relief they now seek from the SEC on their claim of arbitrary and capricious agency action. Thus, we dismiss this claim under section 704.”).

211. *See id.* at 12 (“The no-action letter, however, is an informal response, and does not amount to an official statement of the SEC’s views.” (citation omitted)); *Apache Corp. v. N.Y.C. Emps.’ Ret. Sys.*, 621 F. Supp. 2d 444, 448 n.3 (S.D. Tex. 2008) (“The no-action letter, however, is an informal response, and does not amount to an official statement of the SEC’s views.” (citation omitted)); *see also* *Missud v. SEC*, No. C-12-00161 DMR, 2012 WL 2917769, at *2 (N.D. Cal. July 17, 2012) (“Rule 14a-8 ‘no action’[sic] letters have the status of a final order if two requirements are met. First, the SEC must exercise its discretion to review the staff’s previous determination. Second, the resulting determination must ‘impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.’” (citations omitted)).

212. *See* 5 U.S.C. § 704 (2012) (to be reviewable, decision must be a “final agency action for which there is no other adequate remedy in a court are subject to judicial review”).

213. *Chevron* deference, for example, applies in the context of notice-and-comment. This type of deference likely does not apply to positions set out in no-action letters.

214. *See, e.g., Apache Corp.*, 621 F. Supp. 2d at 449 (“The Second Circuit, however, noted that no-action letters are interpretive because they do not impose or fix a legal relationship upon any of the parties. That court concluded that no-action letters are nonbinding, persuasive authority. This court agrees. Therefore, a court must independently analyze the merits of a dispute even when affirming the SEC’s conclusion.” (citations omitted)); *see also* *Union of Needletrades, Indus. & Textile Emps. v. May Dep’t Stores Co.*, 26 F.Supp.2d 577, 581 n.3 (S.D.N.Y. 1997) (“While not binding, the SEC opinion letters are entitled to some deference from the Court.” (citation omitted)).

215. *See, e.g., Hall v. Tyco Int’l Ltd.*, 223 F.R.D. 219, 248 (M.D.N.C. 2004) (“While it is true that this Court need not defer to the SEC staff’s decision not to recommend enforcement with respect to Tyco International’s decision to exclude Plaintiff’s shareholder proposal, the Court does note that ‘courts have relied on the consistency of the SEC staff’s position and reasoning on a given issue, or the lack of consistency, in determining whether a proposal that was deemed excludable by the SEC staff can in fact be omitted under Rule [14a-8(i)(7)].’” (citation omitted)).

216. *See, e.g., Trinity Wall Street v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 342 n.11 (3d Cir. 2015) (“Although we disagree with the view that the letter holds any

VI. REDUCING ENCRYPTION AND IMPROVING ACCOUNTABILITY

The system would benefit from greater transparency and accountability. Positions should be articulated more clearly and input solicited from interested parties. The Commission should have a greater degree of overt involvement in the review and determination of administrative policies with respect to Rule 14a-8.

Increasing transparency and accountability would allow parties to have more certainty about the application of the rule and ensure that interpretations coincided rather than conflicted with the terms of the provision. Increased certainty would reduce costs. Shareholders would better understand the boundaries of the rule when writing proposals and companies would be less likely to file no-action requests that have little chance of success.

Increased transparency could most easily occur through an expansion of the analysis included in no-action letters. This does not mean that every letter must contain a fulsome explanation of the decision. Where, however, a proposal presents novel facts or could produce a material change in interpretation, a meaningful explanation should be provided.²¹⁷ Parties need not be left with encrypted interpretations that can require years to decipher.

Administrative positions could also be set out more often in legal bulletins. These typically provide more expansive insight. Reflecting the views of the staff rather than the Commission, the missives are typically published at the end of the proxy season. The bulletins, however, are used infrequently²¹⁸ and at least sometimes appear more designed to reduce the administrative work load rather than fully explaining encrypted interpretations.²¹⁹

Increasing the explanatory narrative in no-action letters and bulletins would create greater transparency. Affirmative disclosure of relevant analysis and positions would also likely result in a more rigorous internal process when addressing novel areas. Aware that policies would be more clearly stated and therefore subject to comment or criticism, the determi-

persuasive value, we do give the staff's body of no-action letters 'careful consideration as "representing the views of persons who are continuously working with the provisions of the statute [the regulation in our case] involved."' (quoting *Donaghue v. Accenture Ltd.*, No. 03 Civ. 8329, 2004 WL 1823448, at *3 (S.D.N.Y. Aug. 16, 2004)); see also *Lindner v. Am. Express Co.*, No. 10 Civ. 2228, 2011 WL 2581745, at *4 (S.D.N.Y. June 27, 2011) ("While SEC no-action letters have no precedential effect, they may be treated as persuasive." (citation omitted)).

217. An explanation would have been useful, for example, in the shift in position with respect to special meeting proposals. See *supra* note 199.

218. Ten staff bulletins addressing issues under Rule 14a-8 have been issued since 2000, most recently in November 2017. See Div. of Corp. Fin., SEC Staff Legal Bulletin No. 14I (CF) (Nov. 1, 2017), <https://www.sec.gov/interps/legal/cfs14i.htm> [<https://perma.cc/T43K-ADQA>]. They vary significantly in length and insight.

219. See *supra* note 21.

nation would presumably engender a more meaningful review.²²⁰ The approach also could encourage the adoption of clear, bright-line tests in connection with the application of the rule.²²¹

Such an approach, however, would not, standing alone, ensure an appropriate policy outcome. The process should also build in a mechanism for obtaining input in determining administrative interpretations. This in fact occurred in connection with the application of Rule 14a-8 to shareholder access proposals.

Following the initial decision in *Whole Foods*,²²² the shareholder appealed to the Commission. The Chair of the SEC ordered the original letter withdrawn and the issue revisited.²²³ With the exclusion held in abeyance, interested parties had an opportunity to provide comments.²²⁴ After digesting the various views, the administrative interpretation changed in a manner that better comported with the language and intent of the relevant exclusion.²²⁵ The approach could be replicated in connection with the development of other administrative interpretations under the rule.

Requiring an expanded analysis in no-action letters or staff bulletins and seeking input more frequently would improve transparency and out-

220. This occurred, for example, with respect to the change in position in the *Whole Foods* no-action letter. See *infra* notes 222–25.

221. Others have suggested something similar. See, e.g., Bevis Longstreth, Comm'r, Sec. & Exch. Comm'n Remarks to the National Association of Manufacturers, in Denver, Colo.: The SEC and Shareholder Proposals: Simplification in Regulation 16 (Dec. 11, 1981), <https://www.sec.gov/news/speech/1981/121181longstreth.pdf> [<https://perma.cc/8G3N-6P4H>] (“A return to the simple, bright line approach should protect the good, discourage the bad, and minimize the active, ongoing interference of federal mediators in the relationship between a company and its shareholders.”).

222. SEC No-Action Letter, 2014 WL 5426272 (Dec. 1, 2014).

223. See Public Statement, U.S. Sec. & Exch. Comm'n, Statement from Chair White Directing Staff to Review Commission Rule for Excluding Conflicting Proxy Proposals (Jan. 16, 2015), <https://www.sec.gov/news/statement/statement-on-conflicting-proxy-proposals.html> [<https://perma.cc/QTE4-WW8P>].

224. See Capital One Fin. Corp., SEC No-Action Letter, 2014 WL 7326032, at *1 (Jan. 23, 2015) (special meeting proposal; no-action letter expressed no view on whether proposal could be excluded under subsection (i)(9)); see also AGL Res. Inc., SEC No-Action Letter, 2014 WL 7463987, at *1 (Jan. 23, 2015) (same).

225. See Div. of Corp. Fin, Shareholder Proposals, SEC Staff Legal Bulletin No. 14H (Oct. 22, 2015), <https://www.sec.gov/interps/legal/cfslb14h.htm> [<https://perma.cc/6U24-9X6B>]. Greater alignment, however, may result in positions that suggest weaknesses in the language of the rule. In one no-action letter, the exclusion applied to a proposal seeking to allow 10% of shareholders to call a special meeting. The company proposed to set the percentage at 25%. As the letter reasoned: “We concur that a reasonable shareholder could not logically vote in favor of both.” See Capital One Fin. Corp., SEC No-Action Letter, 2018 WL 446735, at *1 (Feb. 21, 2018). Shareholders, therefore, were deprived of an opportunity to choose alternatives. The no-action letter did require disclosure of the existence of the alternative and the belief that “a vote in favor of ratification is tantamount to a vote against a proposal lowering the threshold.” See *id.*

comes but leave accountability unaddressed. Accountability would require greater direct involvement by the Commission.

The Commission could do so by accepting more appeals and using the appeals to articulate relevant policies. The Commission could also issue releases that seek comments on administrative interpretations and use the input to develop a final standard.²²⁶ Positions emanating from, or approved by, the Commission would be less susceptible to unpredictable change. In *AFSCME v. AIG*,²²⁷ the Second Circuit overturned an administrative interpretation deemed inconsistent with a prior Commission formulation.

VII. CONCLUSION

Greater accountability and transparency would have consequences. Positions would become clearer, to the detriment of those who benefited from uncertainty in any given case. The approach could also become more abrupt. Encryption contemplates that the full extent of an administrative position will only be revealed gradually. The implementation process is therefore more gradual than publicly announced changes.

At the same time, transparency reduces costs. Shareholders will better understand the grounds for exclusion and presumably avoid proposals that will inevitably be excluded. Issuers will better understand in advance the position of the Commission and submit fewer no-action letter requests.

The system will also benefit from increased accountability. Administrative positions will be more clearly tied to decision makers. With responsibility for the outcome better established, the Commission will be more responsible for the quality of the ultimate decisions and the resulting consequences.

226. This occurred in connection with the change in interpretation for the exclusion addressing proposals substantially identical to those submitted by management that arose out of the position taken in the *Whole Foods* no-action letter. See *Whole Foods Market*, 2014 WL 5426272, at *1.

227. 462 F.3d 121, 129 (2d Cir. 2006) (“The SEC has not provided, nor to our knowledge has it or the Division ever provided, reasons for its changed position regarding the excludability of proxy access bylaw proposals. Although the SEC has substantial discretion to adopt new interpretations of its own regulations in light of, for example, changes in the capital markets or even simply because of a shift in the Commission’s regulatory approach, it nevertheless has a duty to explain its departure from prior norms.” (internal citations and quotations omitted)).

2018]

LIMITS OF ENCRYPTED INTERPRETATIONS

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APPENDIX A
APPLICATION OF RULE 14A-8(i)(3): 2000–2017²²⁸

Year	(i)(3) proposals	(i)(3) exclusions (“some basis” for exclusion without the right to cure)	(i)(3) non-exclusions (“unable to concur” on the right to exclude without the right to cure)	(i)(3) exclusions (“some basis” for exclusion <i>with</i> the right to cure)	(i)(3) non-exclusions (“unable to concur” on the right to exclude <i>with</i> the right to cure)
2017	27	0	25	0	2
2016	44	4	40	0	0
2015	49	2	46	0	1
2014	67	26	40	0	1
2013	82	25	57	0	0
2012	73	26	47	0	0
2011	40	9	30	0	1
2010	59	11	48	0	0
2009	92	13	79	0	0
2008	69	27	42	0	0
2007	70	20	49	0	1
2006	70	2	66	1	1
2005	86	6	79	0	1
2004	146	14	40	9	83
2003	144	11	19	7	107
2002	168	15	26	4	123
2001	100	14	8	0	78
2000	81	10	26	2	43

228. Analysis of no-action letters is often done on the basis the proxy area, which approximately runs from July 1 through June 30 of the following year. This table, however, collects data on the basis of each calendar year.